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Supreme Court, U.S.
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No. 021304 MAR 4 20[illegible]

In the
Supreme Court of the United States

ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

J. DAVID BREEMER
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

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QUESTIONS PRESENTED

1. May a federal court impose upon the state a unique, restrictive version of the public trust doctrine that is incompatible with the state's own doctrine and with the decisions of this Court upon which the state's doctrine is premised?

2. Whether a federal court may modify a state's long established public trust doctrine and declare the doctrine a "background principle of the state's law of property" that allows local governments to preclude any economic use of private tidelands that interferes with public recreation without incurring an obligation to pay just compensation.

3. Whether a substantive due process claim is categorically barred when the alleged violation may be partially addressed by a claim for just compensation under the Fifth Amendment, even when the facts and theory relevant to the due process claim differ from the facts and theory applicable to the takings claim.

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PETITION FOR WRIT OF CERTIORARI

Esplanade Properties respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is reported at 2002 U.S. App. LEXIS 20802 (Oct. 3, 2002); it appears as Exhibit A to the petition. The decisions of the Federal District Court for the Western District of Washington are not reported; they appear at Appendices C and D to the petition.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on October 3, 2002. Petition Appendix (Pet. App.) at A-1. On December 13, 2002, the court denied the petition for rehearing and rehearing en banc. Pet. App. at B. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In 1991, Esplanade Properties purchased platted lots of real property located within the harbor of the City of Seattle. The lots are designated as "first class tidelands," a classification reserved for tideland properties that may be privately developed without detracting from the public trust. Esplanade accordingly applied to the City to construct nine above-water, single-family residential homes.

At the time of the application, both the City zoning code and its overlay shoreline regulations permitted Esplanade's proposed residential housing development. However, the zoning code also required residential development to include on-site parking, while the shoreline regulations absolutely prohibited on-site parking. When Esplanade attempted to overcome this regulatory "Catch-22" by seeking a variance, the City cancelled Esplanade's application as a whole. It subsequently refused to reconsider its decision. During the same period, the City amended its shoreline regulations to make the effect of its contradictory parking regulations explicit, absolutely prohibiting residential development on tidelands like Esplanade's.

As a result of the City's actions, Esplanade filed this suit in Washington state court against Respondent City, alleging that the City effected a compensable taking of Esplanade's private property in violation of the Fifth Amendment to the United States Constitution, as incorporated in the Fourteenth Amendment to the Constitution. Esplanade also alleged that the City had deprived Esplanade of due process within the meaning of the Fourteenth Amendment to the United States Constitution. The City removed the case to the federal courts, where it has remained. Esplanade did not prevail in the courts below and now seeks relief from this Court for the federal constitutional errors committed by the United States Court of Appeals for the Ninth Circuit.

A. Factual Background

Upon attaining statehood in 1889, the State of Washington assumed ownership of all tidelands "up to and including the line of ordinary high tide." Wash. Const. art. XVII. Soon after, the Washington Legislature established harbor areas in front of incorporated cities. *See generally Davidson v. Washington*, 802 P.2d 1374 (Wash. 1991). It designated the waters farthest landward of the harbor lines as "first-class" tidelands and directed that these lands be appraised for conveyance into private ownership to facilitate commercial and industrial development. *See* Pet. App. at F-1 to F-9 (Kenan R. Conte, *The Disposition of Tidelands and Shorelands: Washington State Policy 1889-1982*, Nov. 1982) (Master's Thesis).[1]

Subsequent sales of parcels located landward of the inner harbor line conveyed title in fee simple absolute. *See Davidson*, 802 P.2d at 1379 (noting that a 1916 decision "held that shoreland owners hold title inside the harbor line in fee simple absolute"). As a result, conveyances of first-class tidelands to private parties have traditionally included the ability to develop the lands. *Harris v. Hylebos Indus., Inc.*, 505 P.2d 457, 462 (Wash. 1973) ("the legislature has regarded the filling and improving of first class tidelands, particularly in commercial harbors, as an aid to navigation, rather than an obstruction"); *Washington v. Sturtevant*, 135 P. 1035, 1040 (Wash. 1913) ("The state has invited investment in these lands upon the theory that, in private ownership, all land lying back of the inner harbor line or the line of ordinary navigability would be reclaimed and put to useful purposes.").

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[1] Mr. Conte's thesis has been recognized by the Washington Supreme Court as an authoritative source of information regarding the history of Washington's tideland policy. *See Caminiti v. Boyle*, 732 P.2d 989, 996 (Wash. 1987).

Esplanade's property consists of several platted lots of "first-class" tidelands.[2] Pet. App. at D-1. The state originally sold these lots into private ownership in 1906. Esplanade acquired title in 1991, intending to develop the property as single-family residences. Pet. App. at A-2. In June, 1992, Esplanade applied to the City for the necessary development permits. *Id.*

To constitute a permissible development along the Seattle shoreline, a proposal must satisfy the City's zoning code and its supplemental shoreline regulations. *See* Seattle Municipal Code § 23.60.014(A). When Esplanade submitted its development application, Esplanade's property was zoned exclusively for single-family residential uses of medium density. Pet. App. at C-2. For purposes of the shoreline regulations, the property was classified as a Conservancy Recreation Environment (CR), which at that time permitted the construction of above-water residential housing. Pet. App. at A-1; Pet. App. at C-2 (above-water residential development permissible on lots with less than 30 feet of dry land).

The City subsequently amended its shoreline code to prohibit residential development on lots in the CR area, such as Esplanade's, that lack at least fifteen feet of dry land. However, Esplanade successfully vested its application under the earlier, more permissive CR rules. *See* Pet. App. at A-2. Nevertheless, the City denied Esplanade's allowable residential development after expressing concerns over the size and design of the project and, more importantly, Esplanade's intent to provide on-site parking. Pet. App. at C-3. Esplanade responded to these

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[2] For a schematic diagram illustrating the location of first-class tidelands relative to harbor lines and areas, *see* Pet. App. at E (excerpt from Ralph W. Johnson & Eileen M. Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275, 291 (1979)).

concerns by seeking a formal clarification of the City's regulatory code.

"On the issue of parking—the issue most central to this litigation—the City interpreted its [shoreline] code to *prohibit* parking built over water in a single-family zone, but found that generally [under the zoning code], single-family homes *required* on-site parking." Pet. App. at C-3 (emphasis added). Esplanade immediately challenged this interpretation in Washington state court, but did not prevail. Pet. App. at A-3. Faced with a regulatory regime that both required and prohibited on-site parking for its otherwise permissible residential development, Esplanade applied to the City for a variance.[3] This prompted the City to cancel Esplanade's application as a whole. It subsequently refused to reconsider its decision. Pet. App. at A-5.

B. Judicial Proceedings

Esplanade timely challenged the City's cancellation of its application in state court, alleging various constitutional violations. In particular, Esplanade claimed that it had suffered a compensable regulatory taking under the Takings Clause of the Fifth Amendment, as incorporated in the Due Process Clause of the Fourteenth Amendment, on the theory that the City had permanently deprived Esplanade of all economically beneficial use of private property. *See* Pet. App. at C-1 to C-2. Esplanade also alleged that the City had violated Esplanade's substantive due process rights by arbitrarily and capriciously cancelling its application. The City promptly removed the case to the Federal District Court for the Western District of Washington. Pet. App. at D-1. There, the City did not dispute the contention that Esplanade was without economically

[3] Esplanade sought the parking variance after informing the City that it was willing to amend its plans to meet the City's design and size concerns, but did not see how it could possibly satisfy the parking requirement/prohibition without a variance. *See* Pet. App. at C-4.

beneficial use of property, but claimed that this state of affairs was neither caused by the City's actions nor was justifiable under the public trust doctrine. *See* Pet. App at C-2 ("The City claims that the property has no viable economic use, even without the City's regulations"); *id.* at C-13 (City argues that "the 'public trust' doctrine and the SMA are two 'background principles that preclude this type of development.'").

In 2001, the district court issued orders rejecting the due process claim and the takings claim. Pet. App. at C, D. On October 3, 2002, the United States Court of Appeals for the Ninth Circuit affirmed. Relying on a prior circuit court decision, and distinguishing this Court's opinion in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the court below held that Esplanade was absolutely precluded from asserting its substantive due process claim because it was able to raise a claim under the more "explicit" protections of the Takings Clause of the Fifth Amendment. Pet. App. at A-6 to A-7. The court then concluded that Esplanade could not prevail on its available takings claim because the public trust doctrine encumbered Esplanade's property with an inviolable easement in favor of public recreation. *Id.* at A-8 to A-12.

While recognizing that the public trust doctrine normally includes a private interest (the "*jus privatum*") as well as a public interest, the court concluded that only the public use aspect was relevant to the issue of whether Esplanade could make any economically beneficial use of its property. *Id.* at A-6. From this perspective, the court held that the public recreational interest protected by the public trust doctrine was a "background principle" of property law, within the meaning of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). *Id.* As such, the state was "obligated" to prevent Esplanade from using the property in a manner inconsistent with this interest and the City was therefore absolved of any liability if it rendered Esplanade's property economically idle. *Id.* at A-10, A-12; *contra Port of Seattle v. Oregon & Wash.*

R.R., 255 U.S. 56, 65 (1921) ("In every case the state [of Washington] may, in conveying the tide land, either grant or withhold rights in the water or in the water area, as it sees fit."). The court later denied Esplanade's petition for rehearing and rehearing en banc. *See* Pet. App. at B.

As a result of these rulings, the State of Washington has been denied its sovereign authority to identify private interests in public trust waters and lands in a manner that appropriately balances its needs and interests with the requirements of the public trust doctrine. Instead, "first-class" tidelands designated by the state for economic development are now hostage to a federally-mandated public recreational easement. The ultimate result is that Esplanade and similarly-situated landowners are barred from putting their property to developmental use and from seeking just compensation for, *or* invalidation of, the requirement that they leave their property in a natural state for public use.

REASONS FOR GRANTING THE WRIT

On three important questions of takings law and substantive due process law, the court below issued decisions that are in conflict with the decisions of other lower courts, both state and federal. All of these conflicts warrant resolution by this Court.

I

THE DECISION BELOW CONFLICTS WITH THE SEMINAL DECISIONS OF THIS COURT AND DECISIONS OF OTHER LOWER COURTS ON THE SCOPE OF THE PUBLIC TRUST DOCTRINE

It is a general principle of property law that, upon entry to the Union, the states assumed ownership of lands covered by tidewaters and a corresponding duty to keep sufficient areas of these lands open for public navigation, recreation, and commerce. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472-77 (1988). In this case, the Ninth Circuit held that this principle, the public trust doctrine, "alone precluded" residential development of Esplanade's tidelands and that the state is required to enforce this interpretation of the doctrine. This ruling is in manifest conflict with this Court's statements on the public trust doctrine, the law of Washington, and with the decisions of lower federal courts.

A. The Ninth Circuit's Restrictive Interpretation of the Public Trust Doctrine Conflicts with This Court's Decisions on the Scope and Source of the Public Trust Doctrine

In the seminal case of *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892), this Court described the contours of the public trust doctrine. Specifically, this Court declared that, when it comes to navigable waters, the states may not convey vast tracts of submerged land into private hands free of the state's duty to protect the public interest in navigation, commerce, and fishing. However, the *Illinois Central* Court carefully noted that the state *can* so convey individual parcels if doing so is in the public interest or does not cause "substantial impairment of the public interest in the lands and waters *remaining*." *Id.* at 453, 455-56 (emphasis added). Indeed, *Illinois Central* explained that private development was consistent with the public trust doctrine in these circumstances:

> It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained . . . as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State.
>
> *Illinois Central*, 146 U.S. at 452.[4]

Almost a century after the *Illinois Central* decision, this Court affirmed that "the individual States have the authority to define the limits of the lands held in public trust and to recognize *private rights* in such lands as they see fit." *Phillips Petroleum Co.*, 484 U.S. at 475 (emphasis added). The State of Washington is among those states that have exercised this authority by adhering to the doctrine articulated in *Illinois Central*. *See, e.g.*, *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998) ("The control of the State for the purposes of the trust can never be lost, *except* as to such parcels as are used in promoting the interests of the public therein, *or* can be disposed of without any substantial impairment of the public interest in the *lands and waters remaining*.") (emphasis added); *see also Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1987)

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[4] A leading commentator on the public trust doctrine has explained the limited holding of *Illinois Central* as follows:

> [T]he Court did *not* actually prohibit the disposition of lands to private parties; its holding was much more limited. What a state may not do, the Court said, is divest itself of authority to *govern the whole area* in which it has responsibility to exercise its police power.

Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 489 (1970) (emphasis added).

(same). Accordingly, Washington has permitted private development of specified tideland parcels. *See Harris v. Hylebos Indus.*, 505 P.2d 457, 461 (Wash. 1973) ("[T]he notion that all tidelands must be left in their natural state is incompatible with the legislative intent on this matter, as it has been expressed in statutes since the inauguration of statehood.").

The Ninth Circuit's view of the public trust doctrine radically departs from the principles established by this Court in *Illinois Central*, as adopted into Washington law. Perhaps most significantly, the lower court's definition of the doctrine leaves out the important clarification that the state may abdicate control over tidelands when there is no "substantial impairment of the public interest in the *lands and waters remaining*;" i.e., when the state retains control over other lands and waters sufficient for navigational and recreational interests. *See Illinois Central*, 146 U.S. at 452; *Caminiti v. Boyle*, 732 P.2d at 994 (emphasis added).

Without a due regard for lands that remain under state control, the lower court's public trust rule bars divestiture of an interest in a tideland parcel when such action harms the public's ability to use the subject parcel itself, rather than when it jeopardizes the public trust as a whole.[5] In other words, a net

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[5] The court below relied on *Orion Corp. v. Washington*, 747 P.2d 1062 (Wash. 1987), to support the conclusion that harm to public recreational interests prevents residential use of Esplanade's tidelands. But *Orion* is inapposite. That case dealt with a proposal to dredge and fill *5,600 acres* of *second-class tidelands*. *See Orion*, 747 P.2d at 1064-68. In contrast, this case involves residential development of fifteen residentially-zoned lots located on *first-class* tidelands, an area that the state has previously designated for development. The most recent Washington decision specifically dealing with private development of first-class lands concluded that

(continued...)

loss of a public trust interest becomes sufficient to prevent the state from disposing of an interest in tidelands. But the *Illinois Central* formulation is that

> [n]o grant may be made to a private party if that grant is of such amplitude that the state will effectively give up its authority to govern, but a grant is *not illegal solely because it diminishes in some degree the quantum of traditional public uses.*

Sax, *supra,* at 489 (emphasis added); *see also Eastlake Community Council v. Roanoke Associates, Inc.*, 513 P.2d 36 (Wash. 1973) (residential development landward of harbor lines does not impermissibly impair navigability).

The *Illinois Central* principles that control in Washington also allow the state to dispose of tideland parcels when the state determines that this advances a general public interest. *See Rettkowski v. Department of Ecology*, 858 P.2d 232, 239 (Wash. 1993) (state may grant tideland interests to private parties in a way that hinders public access to promote "the overall interests of the public"). Yet, under the lower court's framework, the state may give up its "interests in state waters," which includes public recreation, only if doing so does not "impair the public's interest," which is defined solely in terms of general recreation. Pet. App. at A-12 to A-13. This circular rule effectively prevents the state from conveying control over tidelands for anything other than public recreational purposes, even if it determines that development, or some other use, best serves the public welfare. *Id.* at A-10 ("the public trust doctrine ran with the title to tideland properties and *alone precluded* the shoreline residential development") (emphasis added).

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[5] (...continued)
such development was consistent with the state's public trust doctrine. *See Harris*, 505 P.2d at 466-67.

By so rejecting established *Illinois Central* principles, the lower court dramatically reduces the states' power to define and apply the public trust doctrine. In fact, according to the court below, the State of Washington is "*obligated*" to adhere to a public trust doctrine that bars a "proposal to construct pilings, driveways and houses" in tidelands. Pet. App. at A-11 to A-12 (emphasis added). But, according to this Court and the Washington Supreme Court, the state is free to follow a public trust doctrine that permits private development of certain tidelands. *See Port of Seattle*, 255 U.S. at 65 ("The State may in one year fill and sell the hundred feet of tide lands nearest the upland and in the next year fill and sell the parcel beyond. Or it may sell first the parcel more remote from the upland and later the one immediately adjoining it, or any other. In every case it may, in conveying the tide land, either grant or withhold rights in the water or in the water area, as it sees fit"); *Roanoke Cmty. Council v. Shoreline Hearings Bd.*, 593 P.2d 151, 153 (Wash. 1979) (state's "public benefit" doctrine permitted "substantial development" of floating homes and related facilities"); *Draper Machine Works v. Dep't of Natural Res.*, 815 P.2d 770, 775 (Wash. 1991) (the state may sell and lease tidelands landward of the open waterway to private owners for development).

This sudden and drastic alteration of the substance of the public trust doctrine, and the state's power to define that doctrine, raises great uncertainty as to the ability of the states to adhere to a public trust doctrine that follows the *Illinois Central* guidelines. In particular, the decision below indicates that states simply cannot convey developmental interests in tideland parcels, in accordance with *Illinois Central*, if this diminishes public recreation on those same parcels. Moreover, under the Ninth Circuit's ruling, lands previously conveyed and developed at the direction of the state should remain impressed with a public recreational easement. For these reasons, the decision below will surely "disrupt the settled expectations of landowners" in Washington and every state within the Ninth

Circuit's jurisdiction. *Phillips Petroleum*, 484 U.S. at 485 (O'Connor, Stevens, and Scalia, JJ., dissenting).

This Court should grant the petition to reaffirm the state's power to define the scope of the public trust doctrine in accordance with *Illinois Central* and to protect the expectations of property owners who have relied on the state's attempts to do so.

B. The Ninth Circuit's Restrictive View of State Power to Define the Public Trust Doctrine Is Irreconcilable with Other Federal Decisions

The Ninth Circuit's restrictive interpretation of the public trust doctrine is in conflict with other circuits as well as with this Court and the courts of Washington. In *West Indian Company, Ltd. v. Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988), for example, the Third Circuit considered whether an early grant of harbor lands to a private company was valid under the public trust doctrine. Sanctioned by the Legislature, the grant provided the company with the authority to reclaim submerged portions of a bay, specifically for "development of the harbor." *West Indian Co.*, 844 F.2d at 1020. In reviewing the grant's consistency with the public trust doctrine, the court looked primarily to *Illinois Central*. *Id.* at 1018-19. It interpreted that case as allowing the alienation of the submerged parcels for private development given that the Legislature determined that this served the public interest and would not harm the Legislature's ability to control the rest of the harbor. *Id.* at 1019-21. Finally, the court noted that "[h]arbor development . . . has consistently been recognized as a legitimate public purpose for which submerged lands may be conveyed out of trust." *Id.* at 1020 n.21.

A similarly broad view of the state's power to determine the nature of the public trust doctrine is evident in *Dardar v. LaFourche Realty Co. Inc.*, 985 F.2d 824 (5th Cir. 1993). There, members of the public asserted the right to use privately controlled Louisiana lands covered by waters indirectly

influenced by the tide. In considering whether such lands could be alienated in fee to private owners, the court noted that *Phillips Petroleum* left the determination of the scope of rights in potential public trust lands to state law. Accordingly, the court recognized that "Louisiana *may* transfer ownership of tidelands to private parties if permitted by state law." *Id.* at 830 (emphasis added). Acknowledging that Louisiana had determined that land "indirectly" inundated by the ebb and flow of the tide could be conveyed in entirety, the court upheld the private title holders' right to exclude the general public. *See id.* at 829-31.

The Ninth Circuit's decision is irreconcilable with *West Indian Company* or *Dardar*. Both cases recognize that state law and policy govern the public trust doctrine even when it goes so far as to grant private parties exclusive control of tideland parcels. *See West Indian Co.*, 844 F.2d at 1019 ("If the conveyance represents a deliberate and reasonable decision of the sovereign that the transaction of which the conveyance is a part affirmatively promotes the public interest in the submerged lands, the courts have deferred to the sovereign's decision."). They further acknowledge that states may treat development of tidelands as a legitimate interest under the public trust and are therefore free to recognize private property rights in such lands.

In contrast, the Ninth Circuit effectively rejects state sovereignty over the public trust doctrine. Unlike *Dardar*, the decision below does not permit the state to abrogate control of well-defined tidelands to private parties when such action conflicts with public recreation. Pet. App. at A-16. And unlike *West Indian Co.*, general "[h]arbor development"[6] is not a "legitimate public purpose for which submerged lands may be conveyed out of trust." *Cf. West Indian Co.*, 844 F.2d at 1020

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[6] The "harbor development" upheld in *West Indian Co.* as consistent with the public trust included "development near the downtown area" and development for "offices," and thus did not refer solely to creation of the harbor itself. *See West Indian Co.*, 844 F.2d at 1020.

n.21. The lower court's disdain for the principles of *Dardar* and *West Indian Co.* is clearly shown by its refusal to give any weight to the Washington Shoreline Management Act, which gives "priority for single family residences" when it comes to the development of tidelands. Wash. Rev. Code § 90.58.020.

The court does all this in order to keep Esplanade's property in its natural state for the benefit of the public. This decision is not valid judicial recognition of the modern public trust doctrine, since "[a]chievement of modern environmental protection and resource conservation goals . . . ultimately depend not so much on an 'expansion' of public trust values as it may require a *repudiation* of the doctrine's focus and traditional values." Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 710 (1986) (emphasis added). Here, the Ninth Circuit has unilaterally repudiated the Washington Legislature's decision to permit commerce and industry in "first-class" tidelands and the state judiciary's determination that such a decision is in line with the public trust doctrine.

This restrictive federal version of the public trust now applies to the entire coast of Washington state and may very well alter the disposition of tidelands beyond Washington. In most states, the public trust doctrine "has developed in a manner consistent with the analysis of *Illinois Central*." *West Indian Co.*, 844 F.2d at 1019. Accordingly, it is generally recognized that legislatures have the power to provide for filling and development of limited tideland areas consistent with the public trust. *See, e.g.*, *Morse v. Oregon Division of State Lands*, 590 P.2d 709, 711 (Or. 1979) (Legislature may permit filling of tidelands for nonwater related purposes where public need outweighs recreational interests); *Kootenai Environmental Alliance, Inc. v. Panhandle Yacht Club*, 671 P.2d 1085, 1092-94 (Idaho 1983) (state bodies may alienate interests in public trust resource for construction of private yachting facilities); *see also Berkeley v. Superior Court of*

Alameda County, 606 P.2d 362, 369 (Cal. 1980) (statutes may abandon the public trust on parcels within San Francisco Bay if "intent to abandon [is] clearly expressed or necessarily implied"). The Ninth Circuit's interpretation of the public trust doctrine is inconsistent with these decisions and thus opens the door for local governments in these jurisdictions to bar all economic use of tidelands without fear of liability. To resolve the conflicts among the lower courts regarding the state's power to permit private economic development of navigable waters, this Court should grant the petition.

II

THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF LAW ON WHETHER FEDERAL COURTS MAY MODIFY A STATE'S UNDERSTANDING OF THE PUBLIC TRUST DOCTRINE AND DECLARE THE MODIFIED DOCTRINE A "BACKGROUND PRINCIPLE OF THE STATE'S LAW OF PROPERTY" THAT PRECLUDES ECONOMICALLY BENEFICIAL USE OF LAND

When the government has otherwise effected a regulatory taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution, it has only one escape from the obligation to provide just compensation: "it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992). In other words, the government can avoid compensatory liability when the relevant use restrictions "inhere in the title itself, in the restrictions that *background principles* of the State's law of property and nuisance already place on land ownership." *Id.* at 1029 (emphasis added).

In *Lucas*, this Court elaborated on the nature and limits of the "background principles" exception:

> Any limitation so severe [as to eliminate all economically beneficial use of property] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place on land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts . . . .

Lucas, 505 U.S. at 1029.

In the more recent case of *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court reiterated that the "background principles" concept refers to well-known legal principles of the law of property:

> [The background principles exception] is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed.

Palazzolo, 533 U.S. at 630.

In short, elimination of all economically beneficial uses of property "may be defended only if an *objectively reasonable application* of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found." *Lucas*, 505 U.S. at 1032 n.18. The Ninth Circuit's conclusion that the public trust doctrine requires the state to render Esplanade's property developmentally idle does not meet this standard.

The "common, shared" understanding of the public trust doctrine, rooted in *Illinois Central*, is that the state may choose to permit private development and use of specific tideland parcels

consistent with the public trust doctrine. Washington long ago made this choice, deciding that tidelands between an established inner harbor line (normally coequal to the line of low tide) and the ordinary high water mark should and could be conveyed for private development. *See Sturtevant*, 135 P. at 1037 ("The area lying between high water and the line of navigability, as fixed or to be fixed by the inner harbor line, being, whether submerged or not, theoretically nonnavigable, is treated as land and not water."); *see generally* Pet. App. at F-1, (Conte, supra) Ralph W. Johnson & Eileen M. Cooney, *Harbor Lines and the Public Trust Doctrine in Washington Navigable Waters*, 54 Wash. L. Rev. 275, 301-02 (1979). The Washington Legislature and courts have continued to recognize and protect developmental rights in first-class tidelands. *Harris*, 505 P.2d at 466 (First-class tidelands "have never been classified by the state as navigable waters, but rather have been treated as land. Particularly, where such lands lie in city harbors, as here, they have been regarded as most suitable for reclamation and for dedication to the purposes of commerce and industry.").

In enacting the comprehensive Shoreline Management Act of 1971, the state reaffirmed that residential development—the "nature of the land use proscribed" here— is permitted on tidelands: "it is within the contemplation of the legislation that there will, of necessity, be some future and additional development along shorelines in the state, *including over-the-water construction*, and it does not purport to totally prohibit such development." *Portage Bay*, 593 P.2d at 153 (emphasis added). And the Washington Supreme Court has stated that "the requirements of the 'public trust doctrine' are *fully met* by the legislatively drawn controls imposed by the Shoreline Management Act of 1971." *Caminiti*, 732 P.2d at 995 (emphasis added); *see also Portage Bay*, 593 P.2d at 153 ("any common-law benefit doctrine this state may have had prior to 1971 . . . has been superceded and the SMA is the present declaration for that doctrine"). Consequently, for many first-class tideland owners,

nothing in state or federal law, including the public trust doctrine, has categorically prevented the economic use of their property. Imposition of a contrary standard on Esplanade cannot be reconciled with the equitable and fair nature of the "background principles" exception. *Palazzolo*, 533 U.S. at 630 (a "common-law rule cannot be a background principle for some owners but not for others").

Indeed, in light of Washington's understanding of the public trust doctrine, the Ninth Circuit's restrictive version of the doctrine cannot be a "background principle"exception for purposes of takings analysis. Given the state's long-standing and carefully crafted recognition of private rights in first-class tidelands, the state law moorings necessary to uphold the lower court's finding of a "background principle" are simply absent. And without a solid state law foundation, the lower court's discovery of such a principle amounts to a judicially-decreed evisceration of a traditional private property right. *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Scalia & O'Connor, JJ., dissenting from denial of certiorari); *see also* David L. Callies & J. David Breemer, *Selected Legal and Policy Trends in Takings Law: Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations*, 36 Val. U. L. Rev. 339, 379 (2002) ("newly discovering or expanding such principles in order to protect resources now deemed valuable . . . is inconsistent and irreconcilable with the protection of private rights in land"). This result not only violates Lucas's statement that restrictive background principles may not be "newly legislated or decreed," it utterly ignores this Court's emphatic conclusion that the states are free to protect private rights in tidelands. *See Phillips Petroleum Co.*, 484 U.S. at 475.

To resolve the important question of whether the Ninth Circuit may create a federal public trust "background principle" that conflicts with this Court's own limited, state-law based conception, it is incumbent on this Court to grant the petition.

III

THE DECISION BELOW DEEPENS A CONFLICT AMONG THE LOWER COURTS ON WHETHER A PROPERTY OWNER MAY RAISE A SUBSTANTIVE DUE PROCESS CLAIM WHEN HE MAY ALSO RAISE A CLAIM UNDER THE TAKINGS CLAUSE

The court below held that because Esplanade could raise a claim for just compensation under the more "explicit" protections of the Fifth Amendment's Takings Clause, it was precluded from also alleging that the City had violated its rights to due process of law. Pet. App. at A-8 to A-9.[7] This narrow interpretation of the scope of due process protections is irreconcilable with the decisions of this Court and the decisions of other federal courts.

The lower court purports to rest its refusal to allow a property owner to claim a violation of the Due Process Clause when the Takings Clause may provide relief on *Graham v. Connor*, 490 U.S. 386 (1989). But *Graham* held only that excessive force claims properly arise under the Fourth Amendment rather than the substantive due process guarantees of the Fourteenth Amendment. *See Graham*, 490 U.S. at 395. Accordingly, this Court has never applied *Graham* to preclude a substantive due process claim outside of cases involving Fourth Amendment protections.[8] Neither has this Court repudiated the many cases recognizing that

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[7] The lower court relied on its earlier decision in *Armandariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). *Aremendariz* involved an allegation of a "private taking," i.e., that property had been taken for improper private purposes. The court held that this unique type of takings claim must be challenged under the public purpose aspect of the Takings Clause, instead of through substantive due process protections. *Armendariz*, 75 F.3d at 1324.

[8] This Court's post *Graham* jurisprudence has repeatedly clarified that *Graham* is to be applied sparingly. *See United States v. Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997); *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 499 (1993).

a property owner may resort to substantive due process principles when challenging governmental action adversely affecting the use of property. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390-95 (1926).

Nevertheless, the court below has extended *Graham* to hold that the Takings Clause always subsumes a claim that government has deprived a person of property in contravention of substantive due process guarantees. While a few other circuits have adopted a similar view, *see, e.g.*, *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996), most have refused to adopt this categorical rule. *See The John Corp. v. City of Houston*, 214 F.3d 573, 583 (5th Cir. 2000) ("a blanket rule that under *Graham*, the Takings Clause subsumes any substantive due process claim relating to a deprivation of property is both inconsistent with our precedents and . . . a majority of other circuits"); *Harris v. City of Akron*, 20 F.3d 1396, 1405 (6th Cir. 1994) (due process bars actions that are unreasonable and may not take place no matter what procedural protections accompany them); *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992) (rejecting argument that all "arbitrary and capricious" substantive due process claims are subsumed in takings claims); *Scott v. Greenville County*, 716 F.2d 1409, 1419 (4th Cir. 1983) ("where there is fairly alleged a basis for finding either 'abuse of discretion [or] caprice in [a] zoning administrators refusal to issue' a building permit, a Fourteenth Amendment claim is properly stated").

Consequently, the circuit courts are in manifest conflict on the remedy for property deprivations that are so unreasonable as to be arbitrary. Those that recognize an independent substantive due process claim necessarily view invalidation as the appropriate relief. *See Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990) ("For a facial [due process] challenge, the remedy is the striking down of the regulation. In the case of an as applied

challenge, the remedy is an injunction preventing the unconstitutional application of the regulation to plaintiff's property and/or damages resulting from the unconstitutional application."). In contrast, those in line with the decision below view compensation as the exclusive constitutional relief for arbitrary and irrational regulatory action. *See* Pet. App. at A-8 to A-10. Therefore, jurisdiction currently makes a great difference when a landowner has a valid claim that the government has acted illegitimately.

This Court should grant the petition to address the manifest conflict between the lower court's decision to subsume all claims seeking invalidation of arbitrary governmental action within the Takings Clause and this Court's and other circuit courts' long-standing recognition of independent substantive due process protections. *See, e.g.*, *Pearson*, 961 F.2d at 1220 n.45 ("We wish it were within our power to harmonize these decisions [involving substantive due process claims], but the conflicts among circuits are too great. Harmony will have to await action by the Supreme Court.").

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: March, 2003.

Respectfully submitted,

J. DAVID BREEMER
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for *Petitioner*

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ESPLANADE PROPERTIES, LLC, a Washington limited liability company, Plaintiff-Appellant	)	**FILED**
v.	)	Oct. 3, 2002
CITY OF SEATTLE, Defendant-Appellee.	)	No. 01-36112
	)	**OPINION**

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Plaintiff Esplanade Properties, LLC ("Esplanade") challenges the legality of the City of Seattle's ("the City's") denial of its application to develop shoreline property on Elliot Bay in Seattle, Washington. Esplanade contends that the City's action resulted in a complete deprivation of economic use of its property, constituting an inverse condemnation in violation of federal and state constitutional law, and violating both federal and state substantive due process. Specifically, plaintiff appeals three decisions of the district court which, *in toto*, resulted in the dismissal of its claims against the defendant, *to wit*, granting summary judgment to the defendant on plaintiff's takings claim, granting summary judgment to the defendant on plaintiff's federal substantive due process claim, and dismissing plaintiff's state substantive due process claim. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

Appendix A–2

I. BACKGROUND

In 1992, Esplanade began a long, and ultimately unsuccessful, process of attempting to secure permission to construct single-family residential housing on and over tidelands located below Magnolia bluff, near both a large city park and a large marina. The property is classified as first class tideland, and is submerged completely for roughly half of the day, during which time it resembles a large sand bar.

Esplanade purchased the property for $40,000 in 1991, and quickly retained a development team to design and secure permits for nine waterfront homes, each to be constructed on platforms supported by pilings. In June of 1992, Esplanade applied for building permits, as well as various use permits, variance permits, and special use permits. None of these applications were ever approved.[1]

After reviewing Esplanade's permit applications, the City's Department of Construction and Land Use ("DCLU") identified three significant code compliance issues related to the proposed project: (1) the size of the proposed piers and docks,

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[1] Under Washington's Shoreline Management Act ("SMA"), RCW 90.58.010, enacted in 1971, localities are required to develop a set of regulations with respect to their shorelines. Before 1992, under the Seattle Shoreline Master Program ("SSMP"), developed pursuant to the dictates of the SMA, above-water residential construction was seemingly allowed where the lots had less than 30 feet of dry land. Though the Seattle City Council later amended that provision in the SSMP, instead allowing for such use *only* where a lot has at *least* 15 feet of dry land, Esplanade filed its building permit applications before this change took effect, thus vesting its application to the former provision. *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 720 P.2d 782, 786 (Wash. 1986) ("A vested right merely establishes the ordinances to which a building permit and subsequent development must comply.").

(2) the design of the causeway access to the houses, and (3) lack of parking on dry land. The City notified Esplanade of its concerns in a Correction Notice. Esplanade responded to the City's concerns, and sought three formal code interpretations from the DCLU, each relating to the issues raised by the City. Central to the ongoing dispute, the City was asked, *inter alia*, to interpret the code with respect to parking.[2] According to the City's interpretation, parking built over water in a single-family zone was prohibited, despite the general requirement that single-family homes be constructed *with* onsite parking. Esplanade appealed this interpretation, which was eventually affirmed by the Washington Court of Appeals on the ground that residential housing was not a waterdependent or water-related use.

At the end of the appeals process, in November of 1997, Esplanade was informed by the City that it had 60 days to submit formal alterations to its proposed plan, in light of the DCLU's code interpretations, without which the application would be cancelled. [3] Esplanade, instead of altering its parking proposal, simply applied for a variance. Because Esplanade failed to modify its plans with respect to each of the three design concerns raised by the City, on April 13, 1998, the City

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[2] SSMP prohibits parking above water unless it is accessory to a waterdependent or water-related use. SMC 23.60.092.

[3] After meeting with one of the City's senior land use planners, Esplanade contends that it was given the impression it could satisfy the City's demand to "alter" its application by simply resubmitting the same application along with a request for a parking variance. The City contends that Esplanade had no reason to believe such a submission was adequate, specifically, that *it* never gave Esplanade the impression that it need not address the full panoply of concerns raised by the City with respect to its application.

cancelled Esplanade's application,[4] and later refused to reconsider its unappealable decision.

On June 5, 2000, Esplanade served a letter on the City threatening to make an inverse condemnation claim as a result of the cancellation of its application. Without a response from the City, Esplanade made good on its threat and filed the current action against the City on August 22, 2000.

In its complaint, Esplanade alleges, (1) "inverse condemnation in violation of the federal and state constitutional provisions prohibiting the taking of private property without just compensation," and (2) "violation [of] plaintiff's right to substantive due process, in violation of the state and federal constitutions." Plaintiff seeks "monetary damages" under 42 U.S.C. § 1983 and RCW 64.40.020.

The district court granted the defendant's motion for partial summary judgment, dismissing Esplanade's federal substantive due process claim based upon our holding in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), that federal substantive due process claims are precluded where the alleged violation is addressed by explicit textual provisions of the Constitution, specifically, the Fifth Amendment's "Takings Clause."

The district court, in its Order, did not resolve Esplanade's state substantive due process claim, but requested further briefing from the parties on the question whether the

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[4] Under SMA 23.76.010(F), "An application shall be deemed abandoned and void if the applicant has failed without reasonable justification to supply all required data within sixty (60) days of a written request for it."

matter should be certified for review by the Washington Supreme Court.

Having received supplemental briefing from the parties, the district court dismissed Esplanade's state substantive due process claim on the ground that Washington state courts had authoritatively held that the Washington Constitution provides no greater substantive due process protection than that afforded by the United States Constitution.

Subsequently, the district court granted the defendant's motion for summary judgment on Esplanade's remaining claim, *to wit*, the City's alleged taking of its property without just compensation, in violation of the Fifth Amendment. The court held that because Esplanade failed to establish that the City's action was the "proximate cause" of its alleged damages, and alternatively, because the "background principles" of Washington state law would have precluded the development, under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L. Ed.2d 798, 112 S. Ct. 2886 (1992), the City was not liable to Esplanade.

Esplanade appealed, challenging each of the district court's three decisions.

II. STANDARD OF REVIEW

We review *de novo* the district court's grant of summary judgment. *Panatronic USA v. AT & T Corp.*, 287 F.3d 840, 843 (9th Cir. 2002).

III. DISCUSSION

We turn first to Esplanade's federal and state substantive due process claims.

A. Federal Substantive Due Process

The Fourteenth Amendment's due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In *Armendariz*, 75 F.3d at 1318, we rejected a substantive due process claim brought by plaintiffs (owners of low income housing in San Bernardino) who alleged, *inter alia*, that the City violated their rights by conducting police sweeps resulting in numerous closures of property owned by the plaintiffs. We held that "plaintiffs' substantive due process claim fails because it is preempted by other constitutional claims under the rule of *Graham v. Connor*, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)."[5] *Id.* Because the "Takings Clause 'provides an explicit textual source of constitutional protection' against 'private takings,' the Fifth Amendment (as incorporated by the Fourteenth), 'not the more generalized notion of "substantive due process," must be the guide' in reviewing the plaintiffs' claim of a 'private taking.'" *Armendariz*, 75 F.3d at 1324 (quoting Graham, 490 U.S. at 395).

Esplanade's contention that *Armendariz* is no longer controlling after the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 141 L. Ed. 2d 451, 118 S. Ct. 2131 (1998), is unpersuasive. In that case, a majority of the

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[5] In *Graham* the Court held that claims of excessive force brought pursuant to 42 U.S.C. § 1983 must be analyzed under the explicit textual sources of constitutional protection found in the Fourth and Eighth Amendments, rather than under the "more subjective standard of substantive due process." *Armendariz*, 75 F.3d at 1319. This rule was reaffirmed in *Albright v. Oliver*, 510 U.S. 266, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) (Rehnquist, C.J., for plurality), where the Court required the plaintiff to bring his allegation of criminal prosecution without probable cause under the Fourth Amendment, rather than under the more general protections afforded by the Fourteenth Amendment.

Court held that the Coal Industry Retiree Health and Benefit Act ("Coal Act"), 26 U.S.C. §9701-9722 (1994 ed. and Supp. II), which established a mechanism for providing health benefits to coal industry retirees and their dependents, was unconstitutional. The plaintiff asserted that the Coal Act violated its substantive due process rights and constituted a taking of property in violation of the Fifth Amendment. *Eastern Enters.*, 524 U.S. at 517. Justice O'Connor, writing for four Justices, held that the Coal Act violated the Takings Clause, but explicitly declined to address "Eastern's due process claim." *Id.* at 538. Justice Kennedy, concurring in the judgment, found that the statute should be invalidated based solely upon "essential due process principles, without regard to the Takings Clause of the Fifth Amendment." *Id.* at 539. The remaining Justices found that neither the Takings Clause nor substantive due process was violated by the Coal Act, and none of those Justices analyzed the question under both the Takings Clause and the Fourteenth Amendment.

Eastern Enterprises did nothing to overturn the relevant holding in *Armendariz*. First, of the five Justices constituting the majority, only Justice Kennedy, in concurrence, addressed the due process claim, and he addressed it to the exclusion of the takings claim. The four Justices in dissent decided that the plaintiff had neither a takings claim nor a substantive due process claim. For that reason alone there exists no conflict between the reasoning of the Court in *Eastern Enterprises* and our holding in *Armendariz*. Second, it is beyond cavil that, in our cases decided subsequent to *Eastern Enterprises*, *Armendariz* is treated as controlling precedent. *See, e.g.*, *Weinberg v. Whatcom County*, 241 F.3d 746, 749 (9th Cir. 2001) (dismissing substantive due process claim where takings claim was also filed, and noting, "Under *Armendariz*, the substantive due process claim is properly subsumed by the takings claim."); *Buckles v. King County*, 191 F.3d 1127, 1137 (9th Cir. 1999) (with citation to *Armendariz*, holding that "a

plaintiff is precluded from asserting a substantive due process claim instead of, or in addition to, a takings claim.").

Accordingly, we affirm the district court's dismissal of Esplanade's federal substantive due process claim.

B. State Substantive Due Process

Under Washington law, courts consider six factors in determining the propriety of independent examination of a constitutional claim under the Washington Constitution.[6] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (Wash. 1986). The question presented is whether, in applying those factors, we find it appropriate to conduct an independent analysis of plaintiff's substantive due process claims under Washington law.

We agree with the district court that three recent decisions by Washington courts answer the precise question before us. *State v. Manussier*, 129 Wn.2d 652, 921 P.2d 473, 486 (Wash. 1996) (Washington Supreme Court declining to make independent inquiry into allegation of state substantive due process violation, since, *inter alia*, "the *Gunwall* factors do not favor an independent inquiry under [the Washington Constitution]. . . . [where] factors (1) and (2) indicate co-extensive state and federal protections, inasmuch as the text of Const. art. I, § 3 and the Fifth and Fourteenth Amendments to the Federal Constitution are identical . . . . [and] factors (3) and (4) similarly indicate no broader protection under the state constitution since this court traditionally has practiced great restraint in expanding state due process beyond federal perimeters.") (internal citations and quotation marks omitted);

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[6] Those factors are: (1) the textual language; (2) differences in texts; (3) constitutional and common law history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern. *Gunwall*, 720 P.2d at 812-13.

State v. Burton, 92 Wn. App. 114, 960 P.2d 480, 482 (Wash. Ct. App. 1998) (noting that "the Washington Supreme Court has already established that substantive and procedural due process protections provided by [the Washington Constitution] are not broader than those provided by parallel federal constitutional provisions."); *City of Seattle v. McConahy*, 86 Wn. App. 557, 937 P.2d 1133, 1138 (Wash. Ct. App. 1997) (rejecting argument to "apply a more protective approach [to due process] under the state constitution . . . [where] the [Washington] Supreme Court has held that they are to be interpreted the same way."). These decisions make clear that an independent due process analysis is not called for in this case.

We agree with the district court that the Washington Constitution "is no more solicitous of substantive due process concerns than is the federal constitution." Thus, Esplanade's state due process claim fails as well.

C. Esplanade's Takings Claim

The Takings Clause of the Fifth Amendment prohibits the government from taking "private property . . . for public use, without just compensation." U.S. Const. amend. V. This clause prohibits "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn. Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563 (1960)). In addition to instances of physical invasion or confiscation, the Supreme Court has long held that "if regulation goes too far it will be recognized as a taking." *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (1922).

"Courts have had little success in devising any set formula for determining when government regulation of private

property amounts to a regulatory taking," *Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 216 F.3d 764, 771-72 (9th Cir. 2000), *affirmed by Tahoe-Sierra Preserv. Council, Inc. v. Tahoe Reg'l Planning Agency*, 152 L. Ed. 2d 517, 122 S. Ct. 1465 (2002). However, it is clear that under the "categorical" takings doctrine articulated in *Lucas*, "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019; *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 150 L. Ed. 2d 592, 121 S. Ct. 2448 (2001). Where a regulation "denies all economically beneficial or productive use of land," the multi-factor analysis established in *Penn Central* is not applied, and a compensable taking has occurred *unless* "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. In other words, for a government entity to avoid liability, any "law or decree" depriving the property owner of all economically beneficial use of her property "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

Here, the district court found no taking of plaintiff's property for two reasons. First, the court found that the City's interpretation of the SSMP and its ultimate cancellation of Esplanade's development applications were not the proximate cause of Esplanade's alleged damages. Second, the court found that the background principles of Washington law, specifically the public trust doctrine, burdened plaintiff's property and precluded Esplanade from prevailing in a takings action against the City.

We agree with the district court that under both federal and state law a plaintiff must make a showing of causation

between the government action and the alleged deprivation. *See Tahoe-Sierra* (9th Cir. 2000), 216 F.3d at 783 & n.33 (discussing requirement that "plaintiff [in takings claim] must establish both causation-in-fact and proximate causation," and noting that while "true that there is little discussion of a 'causation' requirement in any of the case law involving regulatory takings," despite a passing reference to proximate cause in *Penn Central*, 438 U.S. at 124, "this is due to nothing more than the fact that, in most regulatory takings cases, there is no doubt whatsoever about whether the government's action was the cause of the alleged taking."); *Ventures N.W. Ltd. P'ship v. State*, 81 Wn. App. 353, 914 P.2d 1180, 1187 (Wash. Ct. App. 1996) ("An owner claiming loss of the economically viable use of property must show that the challenged government regulation proximately caused the loss of all such use.") (citing *Guimont v. Clarke*, 854 P.2d 1 (Wash. 1993), *cert. denied*, 510 U.S. 1176, 127 L. Ed. 2d 563, 114 S. Ct. 1216 (1994); *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022, 100 L. Ed. 2d 227, 108 S. Ct. 1996 (1988)). However, because we find that the background principles of Washington state law would have precluded development of the proposed project, and therefore that plaintiff's claimed property right never existed, we do not address the question of causation.

1. Background Principle: Washington's Public Trust Doctrine

As discussed above, a deprivation by the government of all beneficial uses of one's property results in a taking unless, *inter alia*, the "background principles" of state law already serve to deprive the property owner of such uses. *Lucas*, 505 U.S. at 1029. In *Lucas*, subsequent to plaintiff's purchase of two residential lots of shoreline property, the state of South Carolina passed a statute having the "direct effect of barring petitioner from erecting any permanent structures on his two

parcels," rendering them "valueless." 505 U.S. at 1007. In response, the plaintiff sued, alleging that the government effected a complete deprivation of his property. The Court held that "any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership," and remanded for a determination of whether such "background principles" would have prevented the proposed use of plaintiff's property. *Id.*, 505 U.S. at 1029.

In this case, the "restrictions that background principles" of Washington law place upon such ownership are found in the public trust doctrine. As the Washington Supreme Court recently explained, the "state's ownership of tidelands and shorelands is comprised of two distinct aspects—the *jus privatum* and the *jus publicum*." *State v. Longshore*, 141 Wn.2d 414, 5 P.3d 1256, 1262 (Wash. 2000). Relevant here, the "*jus publicum*, or public trust doctrine, is the right 'of navigation, together with its incidental rights of fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters.'" *Id.* (quoting *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989, 994 (Wash. 1987) (internal quotation marks and citation omitted)). The "doctrine reserves a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership." *Weden v. San Juan County*, 135 Wn.2d 678, 958 P.2d 273, 283 (Wash. 1998), (citing Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 524 (1992)). "The state can no more convey or give away this *jus publicum* interest than it can 'abdicate its police powers in the administration of government and the preservation of the peace.'" *Caminiti*, 732 P.2d at 994 (quoting *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 453, 36 L. Ed.

1018, 13 S. Ct. 110 (1892)). Instead, the state may only divest itself of interests in the state's waters in a manner that does not substantially impair the public interest. 732 P.2d at 993-95.

It is beyond cavil that "a public trust doctrine has always existed in Washington." *Orion Corp.*, 747 P.2d at 1072 (citing *Caminiti*, 732 P.2d at 994). The doctrine is "partially encapsulated in the language of [Washington's] constitution which reserves state ownership in 'the beds and shores of all navigable waters in the state.'" *Rettkowski v. Dep't of Ecology*, 122 Wn.2d 219, 858 P.2d 232, 239 (Wash. 1993) (quoting Wash. Const. art. 17, §1). The doctrine is also reflected in Washington's Shoreline Management Act ("SMA"), adopted in 1971. RCW §§ 90.58.010-.930.[7] Following a long history "favoring the sale of tidelands and shorelands," resulting in the privatization of approximately 60 percent of the tidelands and 30 percent of the shorelands originally owned by the state, *Caminiti*, 732 P.2d at 996, the Washington legislature found that the SMA was necessary because "unrestricted construction on the privately owned or public owned shorelines . . . is not in the best public interest." RCW 90.58.020.

The public trust doctrine, reflected in part in the SMA, unquestionably burdens Esplanade's property.

We agree with the district court that the Washington Supreme Court's decision in *Orion* controls the outcome of this case, and that Washington's public trust doctrine ran with the

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[7] The district court erred in stating that "whatever public trust doctrine existed prior to the enactment of the SMA has been superceded and the SMA is now the declaration of that doctrine." The doctrine itself is reflected *in* the SMA, but is not superseded *by* it, as made clear by the Washington Supreme Court in *Orion*, 747 P.2d at 1073 n.11 ("We have observed that trust principles are *reflected* in the SMA's underlying policy . . . .) (emphasis added).

title to the tideland properties and alone precluded the shoreline residential development proposed by Esplanade.

In *Orion*, the plaintiff corporation, prior to the enactment of the SMA, purchased tideland property in Padilla Bay, the "most diverse, least disturbed, and most biologically productive of all major estuaries on Puget Sound." *Id.*, 747 P.2d at 1065. Orion Corp. proposed dredging and filling of the Bay to create a significant residential community. *Id.* In addressing plaintiff's challenge to subsequent local and state environmental regulations,[8] which it alleged combined to completely deprive it of all economically viable use of its property, the court decided that the tidelands of the Bay were burdened by the public trust doctrine prior to the enactment of the SMA. 747 P.2d at 1072. At the time of Orion's purchase, "Orion could make no use of the tidelands which would substantially impair the [public] trust." 747 P.2d at 1073. Specifically, "Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands since a property right must exist before it can be taken, neither the SMA nor the SCSMMP effected a taking . . . ."*Id.* (internal quotation marks and citation omitted).

We find that the development proposed by Esplanade would suffer the same fate under the public trust doctrine as the project proposed by Orion Corp.

Esplanade's argument that *Orion* lacks authority, following the Court's decision in *Lucas*, is without merit.

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[8] Plaintiff alleged that the SMA and the Skagit County Shoreline Management Master Program (SCSMMP), adopted and approved by the Washington Department of Ecology and designating plaintiff's property as "aquatic," a designation "that foreclosed dredging and filling the tidelands," combined to take its tideland property without just compensation. *Orion*, 747 P.2d at 1066.

Lucas, while articulating an expansive concept of what constitutes a regulatory taking, effectively recognized the public trust doctrine:

> Any [regulation that prohibits all economically beneficial use of land] . . . must in here in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise . . . .The principal "otherwise" that we have in mind is litigation absolving the State (or private parties) of liability for the destruction of "real and personal property, in cases of actual necessity, to prevent the spreading of a fire" or to forestall other grave threats to the lives and property of others.

505 U.S. at 1029 & n.16 (internal citations omitted). *Lucas* does nothing to disturb *Orion's* application of Washington's public trust doctrine.

Esplanade's contention that the proposed development *was* consistent with the SMA at the time his project vested in 1992 is similarly without merit. As the City concedes, at the time of the purchase, the SMA, theoretically, permitted single-family dwellings to be constructed on the property. As the district court noted, however, "there are numerous limitations that the SMA places on developments of shorelines,

even if those developments, like Esplanade's, are not categorically prohibited." (citing, *e.g.*, RCW 90.58.020(2) (requiring that shoreline developments "preserve the natural character of the shoreline"), and RCW 90.58.020(4) (requiring that "projects protect the resources and ecology of the shoreline")). In this case, because Esplanade's tideland property is navigable for the purpose of public recreation (used for fishing and general recreation, including by Tribes), and located just 700 feet from Discovery Park, the development would have interfered with those uses, and thus would have been inconsistent with the public trust doctrine. Therefore, Esplanade's development plans never constituted a legally permissible use.

As the district court correctly noted, "Esplanade . . . took the risk," when it purchased this large tract of tidelands in 1991 for only $40,000, "that, despite extensive federal, state, and local regulations restricting shoreline development, it could nonetheless overcome those numerous hurdles to complete its project and realize a substantial return on its limited initial investment. Now, having failed . . . , it seeks indemnity from the City." The takings doctrine does not supply plaintiff with such a right to indemnification.

IV. CONCLUSION

Esplanade's proposal to construct concrete pilings, driveways and houses in the navigable tidelands of Elliot Bay, an area regularly used by the public for various recreational and other activities, was inconsistent with the public trust that the State of Washington is obligated to protect.

For the reasons given, we affirm.

AFFIRMED.

Appendix B–1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ESPLANADE PROPERTIES, LLP,	**FILED** Dec 13, 2002
Plaintiff-Appellant,	No. 01-36112
v.	D.C. No. C-00-1512R
CITY OF SEATTLE,	**ORDER**
Respondent-Appellee.	

Before: B. FLETCHER and GOULD, Circuit Judges, and MURGUIA,[1] District Judge

The panel has unanimously voted to deny the petition for rehearing. Judge Gould voted to deny the petition for rehearing en banc and Judges B. Fletcher and Murguia so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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[1] Honorable Mary Murguia, United States District Judge for the District of Arizona, sitting by designation.

Appendix C-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESPLANADE PROPERTIES, LLC, a Washington limited liability company,	)	**FILED**
Plaintiff,	)	Nov. 31, 2001
v.	)	No. C00-1512R
THE CITY OF SEATTLE,	)	
Defendant.	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER comes before the court on the parties' cross-motions for summary judgment. This is an inverse condemnation action brought by Esplanade Properties, LLC, ("Esplanade")[1] against the City of Seattle ("City"). Esplanade owns platted lots of first class tidelands in Seattle. Beginning in 1992, Esplanade proposed to develop single family residences on those tidelands. Esplanade alleges that the City's cancellation of its permit application in 1998, in addition to its

[1] For simplicity, "Esplanade" refers collectively to Larry Zahnow, the primary party in interest, Tom Simard, who no longer has any ownership interest, Robert Hillstead, a part owner in Esplanade who is now deceased, and Builder's West, the company that purchased the property in 1991 and filed the permit application.

excessive regulations, has left it with no economic use of its property and thus amounts to an inverse condemnation. The City claims that the property has no viable economic use, even without the City's regulations, and that there was no taking by the City.

Having reviewed the pleadings filed in support of and in opposition to the motions, together with the relevant files, and being fully advised, the court finds and rules as follows:

BACKGROUND

Esplanade, successor to a company called Builder's West, bought the property at issue in 1991 for $40,000 and retained a development team. The property is considered part of the Magnolia tidelands, located from West Point on the north to Smith Cove on the south, and west from the foot of Magnolia Hill. The property is submerged in water about twelve hours a day, and when the tide is out, the area resembles a large sand bar. The proposed design would have placed nine waterfront homes on the property. As of June 30, 1992, the property was zoned "SF 7200," or single family residential, medium density.

Before 1992, a provision in the Seattle's Shoreline Master Program ("SSMP"), a set of regulations that the state Shoreline Management Act ("SMA"), RCW 90.58, required local jurisdictions to adopt, seemingly allowed above-water residential construction (the SSMP allowed shoreline residences on lots that had less than 30 feet of dry land). *See* SMC 23.60.365. In July 1992, however, the City Council amended the ordinance to allow residential construction partially or wholly over water only if the lot had at least fifteen feet of dry land.[2] On August 31, 1992, the Seattle City Council passed

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[2] Esplanade termed this an "emergency ordinance in closed session," while the City claims that the ordinance did not reflect any emergency, but went into effect thirty days after passage, which is

(continued...)

Ordinance 116325 (the "ordinance"), which became effective on February 2, 1993, making the July ordinance permanent. *See* SMC 23.60.360. Esplanade put together building permit applications which were filed before the ordinance took effect.[3]

Having received and reviewed Esplanade's permit applications, on May 19, 1993, the City's Department of Construction and Land Use ("DCLU") provided Esplanade with a list of several aspects of the project that had to be modified in order for the application to proceed. These issues concerned the size of the proposed docks for the houses; the design of the causeway access to the houses; and parking prohibitions. In June 1993, Esplanade submitted responses to the City's request for modification. In its response, some of the corrections were made, some variances were applied for, and three formal code interpretations of particular SSMP provisions were sought. On the issue of parking—the issue most central to this litigation —the City interpreted its code to prohibit parking built over water in a single-family zone,[4] but found also that, generally, single-family homes required on-site parking. Danysh Decl. Ex. A. Esplanade appealed the DCLU interpretations to the City's Hearing Examiner, Superior Court, and ultimately to the Washington Court of Appeals; all upheld City's interpretations.

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[2] (...continued)
standard for City ordinances. There is no evidence in the record that the sole motivation to pass the ordinance was the proposed development on the Esplanade property.

[3] The City concedes that Esplanade successfully vested his application to the former provision of the SSMP which seemingly allowed over-water residential construction. *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986) ("A vested right merely establishes the ordinance to which a building permit and subsequent development must comply.").

[4] The SSMP prohibits parking above water unless it is accessory to a water-dependent or water-related use. SMC 23.60.092.

The Court of Appeals held that residential housing is not a water dependent or water-related use, and thus parking could not be permitted above water at the houses. *See* Rosenberger Decl. Ex. 22.

On November 21, 1997, after exhausting its appeals, Esplanade was told by DCLU that it would have 60 days to submit alterations to its proposed building plans that would correct the deficiencies resulting from the code interpretations or else the application would he cancelled. Shortly thereafter, Esplanade's representatives, land use attorney Larry Smith and architect Warren Pollock, met with one of the City's senior land use planners, Mark Johnson. At that meeting, the group discussed the three design issues that Esplanade needed to address—parking, causeway access, and the proposed floating docks. After assuring Johnson that the latter two issues could be resolved by redesign, Esplanade's representatives conveyed that they would be unable to deal with the parking issue without obtaining a variance. Johnson made no promises on whether the City would grant such a variance. There is some dispute between the parties about what was said at this meeting. Johnson insists he did not suggest that Esplanade could only address the parking issue—and ignore the two other deficiencies—in its corrected application. Esplanade claims to have left the meeting believing that, since the parking issue was the most difficult deficiency to correct, it could resubmit its application addressing only the parking issue.

On January 20, 1998, the 60th and final day to submit its alterations, Esplanade submitted a variance application, requesting only the parking variances. On April 13, 1998, the City notified Esplanade that its application had been cancelled because Esplanade had failed to respond to all three of the

design issues.[5] In a June 30, 1998 letter, the City stated it would not reconsider its decision and that the cancellation was unappealable.

On June 5, 2000, Esplanade served a letter to the City notifying the City that it was making an inverse condemnation claim as a result of the City's cancellation of the building permit applications for the nine homes. Having received no response to that letter, Esplanade, on August 22, 2000, filed its complaint in the instant lawsuit.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Genuine issues of material fact that preclude summary judgment are "disputes over facts that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In deciding a summary judgment motion, the court must view all facts and inferences therefrom in the light most favorable to the non-moving party. *See Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). The "plain language of Rule 56(c) mandates entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear

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[5] The City based its authority to cancel the permit application on language in the Land Use Code. "An application shall be deemed abandoned and void if the applicant has failed without reasonable justification to supply all required data within sixty (60) days of a written request for it." SMC 23.76.010(F). Esplanade resubmitted its application within 60 days, but omitted "all required data."

the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1985).

B. Regulatory Takings

The Takings Clause declares: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V. Justice Black explained, "The Fifth Amendment's guarantee . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Clause is intended to provide compensation when property is taken through lawful procedures for the benefit of the community. Takings can occur through "direct appropriation" of property, *Legal Tender Cases*, 12 Wall. 457, 551 (1871), or through a government's entity's exercise of its regulatory police power. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) ("The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

Esplanade claims that the City's "cancellation" of its building permit applications, together with its unwillingness to reconsider the decision and providing no administrative appeal of the cancellation, has left Esplanade with no economically viable use of its property. Esplanade also claims that the City's interpretations of certain SSMP provisions "effectively prohibited the development" and that the parking regulations "presented an insurmountable obstacle." Pl.'s Br. at 7. These actions, Esplanade contends, amount to a regulatory taking.

The City argues, both in its opposition and in its own summary judgment motion, that Esplanade's project was utterly unfeasible in virtually every respect, and thus the City cannot be blamed for "taking" property of which nothing could be built anyway. Specifically, the City claims that Esplanade had no

money and no chance of shepharding this project through the numerous regulatory hurdles that it faced.

1. Proximate Cause

The City argues that Esplanade cannot show that the City "proximately" caused the alleged damages. Because of the host of seemingly insurmountable hurdles—regulatory, financial, and legal—facing the project, the City contends that Esplanade cannot show proximate causation. In response, Esplanade argues that because the City was the actual body that terminated the development process, the City alone bears responsibility for its alleged damages.

Causation has been recognized as a required element in the takings context. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Aqency*, 216 F.3d 764, 783 (9th Cir. 2000). An owner claiming loss of the economically viable use of property must show that the government regulation proximately caused the loss of all such use. *Ventures Northwest Ltd. P'ship v. State*, 81 Wn. App. 353, 365, 914 P.2d 1180 (1996) ("In a summary judgment proceeding for inverse condemnation, the plaintiff must present evidence that supports at least a reasonable inference that the damage alleged to constitute a taking would not have occurred but for the government conduct at issue . . ."). A determination of proximate cause is generally a question of fact, although with undisputed facts the question may become a determination of law. *France v. Peck*, 71 Wn.2d 592, 430 P.2d 513 (1967).

Even before addressing the feasibility of the project, the issue of causation is problematic for Esplanade. While Esplanade's complaint alleged that the cancellation of the its permit application left it with no economic uses, it has largely abandoned that argument, claiming instead that the parking regulation constituted the taking. *See, e.g.*, Pl.'s Reply Br. at 5. Esplanade complains that "[e]ven if the City allowed revival of [its] application, [it] could never comply with the City's

demand that it include on-site parking for its single family houses built over water, while simultaneously avoiding the construction of parking facilities over water." Pl.'s Mem. in Support of Mot. for Partial Summ. J. at 13. Esplanade seems to ignore the fact that three independent judicial bodies—the City's Hearings Examiner, King County Superior Court, and the Washington Court of Appeals—each upheld the City's interpretations. As such, Esplanade cannot rightly claim that the City is liable because of its reasonable interpretations of the SSMP, which expressly prohibits parking above water unless it is accessory to a water-dependent or water related use.[6] SMC 23.60.092(D).

Turning to the project's feasibility, the court finds that Esplanade cannot show that "but for" the City's action(s) it would have been able to obtain the necessary permits from other regulatory agencies that would have had to approve the project. It is not enough for Esplanade to claim that it cannot presently make economic use of the property, but it must also proffer some evidence that, even if the City had allowed the project to proceed, it could have made economic use of the property. Without such a showing, Esplanade has not demonstrated that any of its proposed uses for the property were "taken" by the City.

The amount of undisputed evidence evincing the utter unfeasibility of this project is impressive. In a December 15, 1992 letter to Mark Johnson of DCLU, the Washington Department of Ecology (DOE), commenting on the Environmental Impact Statement process, wrote, "[DOE] believes [Esplanade's] proposed development does not comply with the use preferences for shorelines of state-wide significance in the [SMA]. The Act gives preference to those

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[6] Nor can Esplanade claim that the City's SSMP regulations themselves have caused a taking of its property. *See* footnote 11, *infra*.

uses which serve the public interest and which minimize impacts to the shoreline resource (RCW 90.58.020). This project does not appear to provide any overriding public benefit and will cause probable substantial impact to the shoreline environment." Rosenberger Decl. Ex. 12. As to the project's consistency with the SSMP, the DOE concluded that it saw "serious specific problems with the proposal," including the use of the breakwater, the fact that the statute requires structures submerged in right of ways to be floating, and that overwater parking is prohibited by the SSMP and no variance can be granted for a prohibited use. DOE had the discretion to withhold approval of the project, *see* RCW 90.58.140(10), and, in its view, the project violated both the overall policy of the SMA, which DOE is authorized to enforce, and every use preference for shorelines of state-wide significance. *See* Rosenberger Decl. Ex. 12. (concluding that "the project does not meet the [SMA]'s use preferences for shorelines of state-wide significance"). The DOE Shoreline Specialist who authored the letter has submitted a declaration, confirming that, whether or not the project was altered to satisfy the City's review process, the DOE would still not have issued a permit for the project. Hegy Decl. ¶ 4 ("[A]s long as the principal purpose of the project, residential housing over water, . . . [the] project would not satisfy the use preferences for shorelines of state-wide significance."). Other authorities on shoreline development in the state confirm that the project was incurably in conflict with the fundamental policies and regulations of the SMA. *See* Weinman Decl.; Buck. Decl.

The DOE was not the only regulatory agency that would have needed to approve the development proposal. Others included the State Shorelines Hearings Board, the State Department of Fish and Wildlife, the United States Coast Guard, the Army Corps of Engineers and two Indian Tribes. The Army Corps' of Engineers would require that the project go through an "alternatives analysis," and the Corp's

environmental analyst concluded that, because of issues related to the Endangered Species Act, the Clean Water Act, and the Rivers and Harbors Act, "it would have been very difficult for them to get through the permit process." Terzi. Decl. ¶ 6. But the Corps' permit could not even be issued without tribal approval, which was never obtained. In fact, two Indian tribes who exercise treaty rights to fish in the vicinity of the proposed construction submitted letters to the DCLU expressing concern about the project and advising the City of their rights. Rosenberger Decl. Ex. 31, 32.

That Esplanade could not have financed the project is also amply supported. Esplanade's architecture firm projected the cost of the EIS alone to be over $1 million. Rosenberger Decl. Ex. 15. The EIS was never completed. Zahnow admitted in his deposition that he did not have the money to do the EIS, which would have been required before permits would be issued by either local, state or federal agencies. Zahnow Dep. at 84. The unrebutted evidence also shows that there were no investors and no financing for the project and that, even assuming the project could have been completed, its cost would have far exceeded what it would have recovered in sales. Gibbons Decl. Ex. 1.

In the face of this extensive evidence, Esplanade has proffered little evidence—other than its own team members' beliefs—of the project's feasibility.[7] Its only response has been

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[7] Esplanade has in fact conceded that the project was not feasible. In its complaint filed against its previous attorneys, Esplanade alleged that they had committed malpractice because the attorneys "not only failed to tell [Esplanade] that the project plans . . . were not in conformance with the code, but represented to the contrary at various times that the project had no 'fatal flaws .' . . . The project design did accordingly have 'fatal flaws' in that the proposed residences could not have

(continued...)

that these feasibility issues are irrelevant to the determination of liability. The court disagrees. The feasibility of a proposed development is indeed a factor to consider in determining the fair market value of the property after liability has been established. *See United States v. 62.50 Acres of Land*, 953 F.2d 886, 890 (5th Cir. 1992). However, Esplanade has failed to establish an essential element of takings liability. Esplanade has not shown that the City's cancellation of the permit application—or its interpretation of the SSMP—was the cause in fact of the purported loss of all reasonable use. Accordingly, Esplanade is not entitled to partial summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (holding that Rule 56(c) mandates the entry of summary judgment against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case).

2. The Public Trust Doctrine and "Background Principles" of Washington Law

An alternative basis exists for denying Esplanade's takings claim: "background principles" of Washington law—specifically, the public trust doctrine—would have precluded the development, and therefore the City cannot be liable for taking a property right that did not exist.

a. *Lucas v. South Carolina Coastal Council*

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court required that if a property owner is subject to a complete deprivation of value, the restriction may not be a novel extension of a valid theory, but must result from restrictions that "background principles" of the state's law of property and nuisance already place upon land ownership. In *Lucas*, the Beachfront Management Act in South

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[7] (...continued)
garages, and the proposed causeway and floating docks could not be built." Rosenberger Decl. Ex. 23, ¶ 20.

Carolina created a "dead zone" along the shore in which the construction of residences was precluded. At the time Lucas purchased the lots there were no governmental restrictions that would bar the lots from their intended purpose. The subsequent restrictions, however, precluded all construction except for such things as small wooden decks and walkways. Lucas brought an inverse condemnation claim against the South Carolina Coastal Council claiming that the new regulation deprived him of all "economically viable use" of his property and therefore effected a taking.

The Court noted that while it generally had applied the *Penn Central*[8] ad hoc balancing test to regulatory takings, it had found "categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of the land." *Id.* at 1015 (quoting *Agins v. Tiburon*, 447 U.S. 255 (1980)). The Court stated that "[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. The court went on to say that "[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place on land ownership." *Id.* at 1029. The Court ultimately remanded the case to determine whether common-law "background

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[8] Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, determining whether a taking has occurred depends on factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)

principles" would have prevented the erection of any habitable or productive improvements on Lucas's land.

Esplanade argues that there are no "background principles" of Washington law that would have foreclosed developing its property. The City responds by arguing that the "public trust" doctrine and the SMA are two "background principles" that preclude this type of development. Esplanade, therefore, never had the right to develop its property in this manner.

b. The Public Trust Doctrine

The "public trust" doctrine provides that certain natural resources, particularly the ocean and shoreline, and navigable waters and their shores, are deemed the common property of mankind and are available for use by the people. *Caminiti v. Boyle*, 107 Wn.2d 662, 732 P.2d 989 (1987). The doctrine "prohibits the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired . . . ." *Weden v. San Juan County*, 135 Wn.2d 678, 698-99, 958 P.2d 273 (1998). In *Wilbour v. Gallagher*, the Washington Supreme Court explained, "the public has the right to go where the navigable waters go, even though the navigable waters lie over private owned land." 77 Wn.2d 306, 315-16, 462 P.2d 232 (1970).

The public trust doctrine burdens Esplanade's tidelands. *See Orion Corp. v. State*, 109 Wn.2d 621, 639, 747 P.2d 1062 (1987) (noting that the public trust doctrine has always existed in Washington and that it applies to the state's tidelands). Esplanade proffers two reasons, however, why the "public trust" doctrine does not bar its proposed use of the property. First, Esplanade argues that Washington law has "traditionally

encouraged" the development of first class tidelands.[9] Esplanade points to the first Washington legislature's requiring first class tidelands to be platted, appraised, and made available for private sale, 1889-90 Wash. Laws 431-37, as evidence that "background principles" of Washington do not preclude development of Esplanade's property.

Second, Esplanade points to *Caminiti*, in which the Washington Supreme Court stated that "the requirements of the public trust doctrine" are fully met by the legislatively drawn controls imposed by the [SMA]." 107 Wn.2d at 770. Esplanade argues that, at the time the project vested in 1992, the SMA, codified in the SSMP, defined the property as a "Conservancy Recreation Environment" ("CR"). SMC 23.60.360. Under this code section, which overlays the existing city zoning code of SF 7200 (single family residential, medium-density), single family housing was the only permissible use on the property.

i. The SMA is the relevant "background principle" of Washington law

Esplanade argues that the more modern treatment of tidelands and other environmental protections cannot be considered part of the state's historical treatment of these areas and thus cannot be considered a "background principle" under *Lucas*, sufficient to preclude liability for a taking. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2464, 2448 (2001) ("background principles" are "those common shared understandings derived from a State's legal tradition"). Thus, according to Esplanade, "[a]pplying the public trust doctrine to preclude all viable economic use of [its] property would constitute a wholesale change in Washington's traditional

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[9] First class tidelands are distinguished from second and third class tidelands by their location and the state's historic policy toward those tidelands. *Compare* RCW 79.01.020 *with* RCW 79.01.024.

conception of the rights held by owners of first class tidelands." Pl.'s Reply at 11. The court disagrees.

Following the enactment of the SMA in 1971, Washington changed its policies with respect to tidelands.[10] The state legislature found that the SMA was needed because "unrestricted construction on the privately owned or public owned shorelines of the states is not in the best public interest, and therefore, coordinated planning is necessary in order to protect the public interest . . ." RCW 90.58.020. Therefore, the SMA was designed to "prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines." *Id.* That the SMA changed the state's regarding the development of tidelands is evident in a number of ways. The *Harris* court noted, for example, "Until 1971, Washington had a liberal policy favoring the sale of tidelands and shorelands. [The SMA] now prohibits all such sales except for limited sales of certain second class shorelands of navigable lakes." 81 Wn.2d at 673 n.25. Washington courts have, accordingly, recognized that whatever public trust doctrine existed prior to the enactment of the SMA has been superceded and the SMA is now the declaration of that doctrine. *See Portage Bay-Roanoke Park Cmty. Council v. Shorelines Hearings Bd.*, 92 Wn.2d 1, 4, 593 P.2d 151 (1979). Thus, the

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[10] The SMA provides in part:

> It is the policy of the state to provide for the management of the shorelines of the state by planning for and fostering all reasonable and appropriate uses. This policy is designed to insure the development of these shorelines in a manner which, while allowing for limited reduction of rights of the public in the navigable waters, will promote and enhance the public interest. This policy contemplates protecting against adverse effects to the public health, the land and its vegetation and wildlife, and the waters of the state and their aquatic life, while protecting generally public rights of navigation and corollary rights incidental thereto.

century-old historical treatment tidelands, on which Esplanade relies, is no longer the relevant "background principle" of Washington law.

Esplanade's historical arguments would be more germane had it bought the property before 1971 and was challenging the effects of the SMA itself.[11] Such a scenario would have made it analogous with the facts of *Lucas*. But a crucial difference between *Lucas* and this case is that *Lucas* was challenging a new statute which, he alleged, deprived him of reasonable use of his property. The Supreme Court therefore addressed whether "background principles" of South Carolina property law would have precluded the uses anyway. These are not the facts presently before the court. Esplanade purchased the property in 1991, not 1891, and was thus subject to the limitations imposed by the public trust doctrine as codified in the SMA.[12]

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[11] The enactment of the SMA and the SSMP, as a matter of law, could not have amounted to a taking of Esplanade's property. As *Orion* demonstrates, a property owner cannot sue for a taking as a result of SMA or the SSMP (or, in *Orion*, the SCSMMP). *See Orion*, 109 Wn.2d at 660 (explaining that since the statutes "qualified as a public health and safety regulation, [they are] insulated from characterization as a taking, and thus subject to challenge only under substantive due process").

[12] That Esplanade bought the property with knowledge of the limitations imposed by the SMA does not, without more, preclude its takings claim. The court is aware of the Supreme Court's recent decision in *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), in which the Court stated that post-enactment purchasers do not forfeit a takings challenge simply because they are deemed to have notice of the regulations. The Court wrote that if it were "to accept [such a] rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable." *Id.* at 2462-63. In other words, whether

(continued...)

ii. Substantial impairment of the public trust

Having determined that the relevant "background principles" of state law are those embodied in the SMA, the next task is to determine whether in fact those principles would have precluded the Esplanade development.

The court is persuaded that *Orion Corp. v. State*, 109 Wn.2d 621, 747 P.2d 1062 (1987), controls the outcome here. In *Orion*, the Washington Supreme Court applied the public trust doctrine to similar facts and held that the doctrine would have precluded residential development in Orion's tidelands. Thus, because the tidelands were always burdened by the public trust, the regulations imposed by the SMA and the Skagit County Shoreline Management Master Program (SCSMMP), did not amount to a taking of the property.[13]

Esplanade argues that, because *Orion* was decided before *Lucas*, the *Orion* court's decision applying the public trust doctrine to impair development of the state's tidelands is no

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[12] (...continued)
a purchaser bought his property before or after the enactment of the SMA in 1971, *Palazzolo* does not insulate the state from any takings claim that might arise as a result of the SMA. However, that Esplanade bought the property in 1991 does not exempt it from the limitations of the SMA. Neither *Lucas* nor *Palazzolo* require this court to ignore the SMA and consider the state's treatment of tidelands at the turn of the century to be the relevant "background principles."

[13] The *Orion* court concluded that Orion's property, which it purchased before the enactment of the SMA, was nonetheless burdened by the public trust doctrine, as that doctrine had always existed in Washington. However, in determining whether Orion's proposed development was consistent with the public trust, the court used the SMA as the relevant yardstick. *See* 109 Wn.2d at 641. Thus, despite the fact that Orion challenged the SMA itself, the analysis of the *Orion* court is highly apposite to the instant matter.

longer good law.[14] The court disagrees. That Orion was decided before *Lucas* does not diminish its value regarding the scope of the public trust doctrine in Washington.

While there is not the broad, absolute prohibition on developing first class tidelands that the City suggests, the public trust doctrine, as codified in the SMA, nonetheless imposes substantial limitations on the development of tidelands. *See Weden v. San Juan County*, 135 Wn.2d 678, 698-99, 958 P.2d 273 (1998) (stating that the public trust doctrine "'prohibits the State from disposing of its interest in the waters of the state in such a way that the public's right of access is substantially impaired . . . .'"). Moreover, the public trust doctrine extends "beyond navigational and commercial fishing rights to include "incidental rights of fishing, boating, swimming, water skiing,

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[14] In another attempt to distinguish *Orion*, Esplanade argues that there is a crucial distinction between *Orion* and this case: *Orion* involved second-class tidelands which have traditionally been more protected than the first class tidelands like those at issue here. The public trust, Esplanade argues, has never represented a bar to development of first class tidelands or mandated those tidelands remain economically idle. However, the *Orion* court, rejecting a similar argument, never suggested that its holding turned on which class of navigable tidelands the proposed development was located. *See* 109 Wn.2d at 639-40.

Esplanade also points out that in *Harris v. Hybelos Industries*, the Washington Supreme Court noted that "the legislature has regarded the filling and improving of first class tidelands particularly in commercial harbors, as an aid to navigation, rather than an obstruction." 81 Wn.2d 770, 778, 505 P.2d 457 (1973). The pronouncements of the *Harris* court, on which Esplanade relies so heavily, are dictum and moreover do not seem entirely consistent with the later holdings of that Court, especially *Wilbour*, *Caminiti*, and *Orion*. The *Wilbour* court, moreover, distinguished *Harris* by noting that the tidelands in *Harris* were dedicated to heavy industry and that there was no showing that the public had any access to those tidelands. That distinction is equally relevant here.

and other related recreational purposes . . ." *Orion*, 109 Wn.2d at 641 (quoting *Wilbour*, 77 Wn.2d at 316).

Esplanade contends that its proposed use is consistent with the SMA because, at the time its project vested in 1992, the SMA actually permitted single-family dwellings to be built on the property. Pl.'s Mem. in Supp. of Mot. for Partial Summ. Judg. at 16. Assuming the SMA and SSMP generally permitted single family residences to be built on Esplanade's property, this fact alone is not enough to show that the controls of the public trust doctrine and the SMA were met. There are numerous limitations that the SMA places on developments of shorelines, even if those developments, like Esplanade's, are not categorically prohibited. *See, e.g.*, RCW 90.58.020(2) (requiring that shoreline developments preserve the natural character of the shoreline); RCW 90.58.020(4) (requiring that projects protect shoreline resources). That the SMA might have permitted certain single family residences to be built on this category of property is, without more, insufficient to establish that Esplanade's proposed use is consistent with the SMA.[15] Indeed, the undisputed evidence tends to show just the opposite.

Like Orion's, Esplanade's tidelands are navigable for the purposes of public recreation. It is undisputed that the property consists of land waterward of the mean higher high water mark (the average, over time, of the highest tide each day); the Esplanade property is therefore navigable during high tides. The City has also proffered unrebutted evidence that the Esplanade property is used for fishing and recreation. The project site is just 700 feet south of Discovery Park and would

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[15] Furthermore, it is not enough for Esplanade to claim that its proposed uses were merely permissible. There is an additional requirement that, before a property owner can recover for a regulatory taking, he must also show that the proposed use would be reasonably profitable. *See Orion*, 109 Wn.2d at 660. Esplanade has not made such a showing.

impact this recreational asset. Rosenberger Decl. Ex. 13 at 3. Comment letters attested to the regular use of the property for boating and recreation. Id. Exs. 37-39. Native Americans use the area for fishing. *See Muckleshoot Indian Tribe & Suquamish Indian Tribe v. Hall*, 698 F. Supp. 1504, 1505 (W.D. Wash. 1988). Undoubtedly the project would have interfered with these uses—it would have required concrete pilings, topped by roads and houses. Moreover, Esplanade's structures would have covered 160,000 square feet of "shoreline of state-wide significance." Gross Decl. Ex. 1.[16] As such, Esplanade's tidelands are subject to even more substantial state planning authority than would be other shorelines under the SMA. *See Beuchel v. State Dept. of Ecology*, 125 Wn.2d 196, 884 P.2d 910 (1994).

The *Orion* court concluded that "[s]ince a 'property right must exist before it can be taken,' neither the SMA nor the SCSMMP effected a taking by prohibiting Orion's dredge and fill project." *Id.* at 642 (citations omitted). Similarly, because Esplanade's proposed project would have interfered with such incidental and recreational uses as "fishing, boating, swimming, water skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Wilbour*, 77 Wn.2d at 316. As such, this case fits squarely within *Orion*—that residential development on navigable tidelands used for public recreation is inconsistent with the public trust doctrine. Therefore, because of the limitations imposed by the public trust doctrine and the SMA, Esplanade's development plans never constituted a legally permissible use.

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[16] Since the project proposes to extend below the line of extreme low tide, it would therefore occur within a "shoreline of statewide significance." RCW 90.58.030(2)(e); Rosenberger Decl. Ex. 12.

CONCLUSION

This court finds that Esplanade was aware when it acquired the property of the countervailing considerations and concerns regarding shoreline development in Washington. In fact, when it purchased this large tract of shoreline in 1991 for only $40,000, Esplanade acknowledged that the property "was considered of little value and non-buildable by the owner." Rosenberger Decl. Ex. 1. Esplanade therefore took the risk that, despite the extensive federal, state, and local regulations restricting shoreline development, it could nonetheless overcome those numerous hurdles to complete its project and realize a substantial return on its limited initial investment. Now, having failed to consummate the development, it seeks indemnity from the City. For the foregoing reasons, the court finds that such a remedy is unwarranted.

Therefore, the court hereby GRANTS defendant's motion for summary judgment [docket no. 74-1] and DENIES plaintiff's motion for partial summary judgment [docket no. 50-1]. Plaintiff's Motion for a Continuance [docket no. 77-1] and defendant's Motion to Strike the Cost Estimate of Roger Mebust [docket no. 63-1] are hereby STRICKEN as moot.

DATED at Seattle, Washington this 31st day of October, 2001.

/s/ Barbara J. Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT
JUDGE

Appendix D-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESPLANADE PROPERTIES, LLC, a Washington limited liability company,	)	**FILED**
	)	No. C00-1512R
Plaintiff,	)	MAY 9, 2001
v.	)	ORDER GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
THE CITY OF SEATTLE,	)	
Defendant.	)	

THIS MATTER comes before the court on defendant City of Seattle's motion for summary judgment. Having considered all documents filed in support and in opposition, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

In June 1992, plaintiff Esplanade Properties, LCC ("Esplanade") applied for building permits to develop waterfront property located on Elliott Bay in the city of Seattle. Esplanade planned to construct nine single-family residences on this property. Because the property is partially submerged for part of each day, Esplanade planned to build the homes on platforms supported by pilings. In addition to the building permits, Esplanade also applied for various street use permits, variance permits, and special use permits so that it could construct streets, utility lines, a breakwater for shielding the residences, and various other structures. Defendant City of Seattle ("the City") has not yet granted any of these permits.

During the early stages of review, the City identified three significant code compliance issues related to the project, including problems with the design of a proposed elevated causeway structure, the size of proposed piers and docks, and the location of proposed parking areas. The City notified Esplanade of these issues in a Correction Notice, which issued in January 1993. Eventually, Esplanade requested that the City's Department of Design, Construction and Land Use ("DCLU") issue formal land use code interpretations covering the three disputed issues. The DCLU Hearing Examiner's interpretations were, ultimately, not favorable to Esplanade. The interpretations survived review up through the Washington Supreme Court, which denied discretionary review.

Following the end of the litigation relating to the code interpretations, the City informed Esplanade in a November 21, 1997 letter that it needed to revise its plans by January 20, 1998, in order to avoid cancellation of the project. In response, Esplanade submitted an application for a parking variance. The City cancelled the project on April 13, 1998. Esplanade sought administrative review, which the City denied.

Esplanade subsequently filed this action against the City, alleging inverse condemnation under the federal and state constitutions, violations of substantive due process, and violations of 42 U.S.C. § 1983 and RCW 64.40. The City moves for partial summary judgment dismissing Esplanade's substantive due process claims and its RCW 64.40 claim. In its response to the City's motion for partial summary judgment, Esplanade concedes that its Chapter 64.40 claim is time barred. Thus, the only issues now before the court relate to Esplanade's state and federal substantive due process claims.

II. DISCUSSION

A. Summary Judgment Standard

The Federal Rules of Civil Procedure provide that a court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

B. Federal Substantive Due Process Claim

As its first cause of action, Esplanade alleges that the City's conduct resulted in an inverse condemnation in violation of the Fifth Amendment takings clause[1] and the Washington State constitutional provision prohibiting the taking of private property without just compensation. *See* U.S. Const. amend. V; Wash. Const. Art. I, § 16. Esplanade also alleged, as a second cause of action, that the City violated its right to substantive due process by arbitrarily and capriciously cancelling its project application and eliminating all reasonable economic use of the land.

The Fourteenth Amendment's due process clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Although the due process clause confers both procedural and substantive rights, Esplanade alleges only violations of substantive due process. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996).

Substantive due process protection, however, is not without limits. In *Armendariz*, the Ninth Circuit rejected the landowners' substantive due process claim because the claim

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[1] The United States Constitution's takings clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V.

challenged conduct otherwise addressed by the Fifth Amendment's takings clause. *Id.* at 1328. The landowners' substantive due process claim in *Armendariz* alleged that "the city's invocation of its emergency powers to close down [the landowners'] properties when no real emergency existed, along with other actions by the city . . . was arbitrary and capricious, and violated [the landowners'] Fourteenth Amendment right to substantive due process." *Id.* at 1315. The court found that the Fifth Amendment's takings clause provided limitations for the property-depriving conduct asserted in the landowners' substantive due process claim. *Id.* at 1321. Accordingly, the court held that the landowners' substantive due process claim was precluded, articulating that "[s]ubstantive due process analysis has no place in contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Id.* at 1325-26.

The language and substance of Esplanade's substantive due process claim is similar to the claim asserted in *Armendariz*. In its claim, Esplanade alleges that the City's actions resulted in a deprivation of property without compensation. Thus, just like the government's conduct in *Armendariz*, the City's conduct that Esplanade complains of, i.e, deprivation of property, falls within the scope of the Fifth Amendment's takings clause. Esplanade contends that the rule in *Armendariz* does not bar its "arbitrary and irrational" substantive due process claim. However, a plaintiff cannot "sidestep *Armendariz* by re-characterizing [its] claim as lying solely in substantive due process." *Macri v. King County*, 126 F.3d 1125, 1129 (9th Cir. 1997). This rule holds especially true here, where Esplanade makes no attempt to request either injunctive or declaratory relief—the standard relief associated with "arbitrary and capricious" type substantive due process claims. *See Eide v. Sarasota County*, 908 F.2d 716, 722 (11th Cir. 1990) (noting that relief for substantive due process claims

in land use context is either a striking down of the regulation or an injunction preventing the unconstitutional application of the regulation). Thus, because the Fifth Amendment offers explicit protection against the type of governmental conduct alleged in this case, under *Armendariz*, "the claim must be analyzed under [the takings clause] alone, and not under the mere general guarantee of substantive due process." *Macri*, 126 F.3d at 1128 (citing *Armendariz*, 75 F.3d at 325-26).

C. State Substantive Due Process Claim

Esplanade presents two arguments as to why it should be allowed to proceed with its state substantive due process claim. First, Esplanade argues that the Washington Supreme Court has allowed substantive due process claims to proceed in factually similar land use cases, including the post-*Armendariz* decision in *Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947 (1998). Second, Esplanade argues that, under the analysis provided in *State v. Gunwall*, 106 Wn.2d 54 (1986), its state claim stands because the Washington Constitution extends broader rights to its citizens than the United States Constitution.

This case turns exclusively on the issue raised in Esplanade's second argument. The Ninth Circuit has recently indicated that, in a case where *Armendariz* applies to bar a federal due process claim, the viability of a land use plaintiff's state due process claim turns entirely on the issue of "whether the Washington Constitution provides greater substantive due process protection than the United States Constitution." *Buckles v. King*, 191 F.3d 1127, 1138 (9th Cir. 1999) (rejecting plaintiff's argument that *Mission Springs* controlled). The *Buckles* court, however, never reached the constitutional protection issue because the parties failed to "argue and brief the six factors laid out by the Washington Supreme Court for determining whether the Washington Constitution provides broader rights than the United States Constitution." *Id.* (citing *Gunwall*, 106 Wn.2d 54).

Here, both parties have argued and briefed the six *Gunwall* factors. However, because this issue may best be suited for certification by the Washington Supreme Court pursuant to RCW 2.60, the court declines to conduct a *Gunwall* analysis at this time.

CONCLUSION

For the foregoing reasons, the court GRANTS IN PART defendant's motion for partial summary judgment. Plaintiff's federal substantive due process claim and its RCW 64.40 claims are dismissed. Additionally, the court orders that both parties submit memoranda on the issue of whether the state law question should be certified for review by the Washington Supreme Court, pursuant to RCW 2.60. Said memoranda shall not exceed five pages and shall be submitted to the court no later than May 19, 2001.

DATED at Seattle, Washington this 8th day of May, 2001.

/s/ Barbara Jacobs Rothstein
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

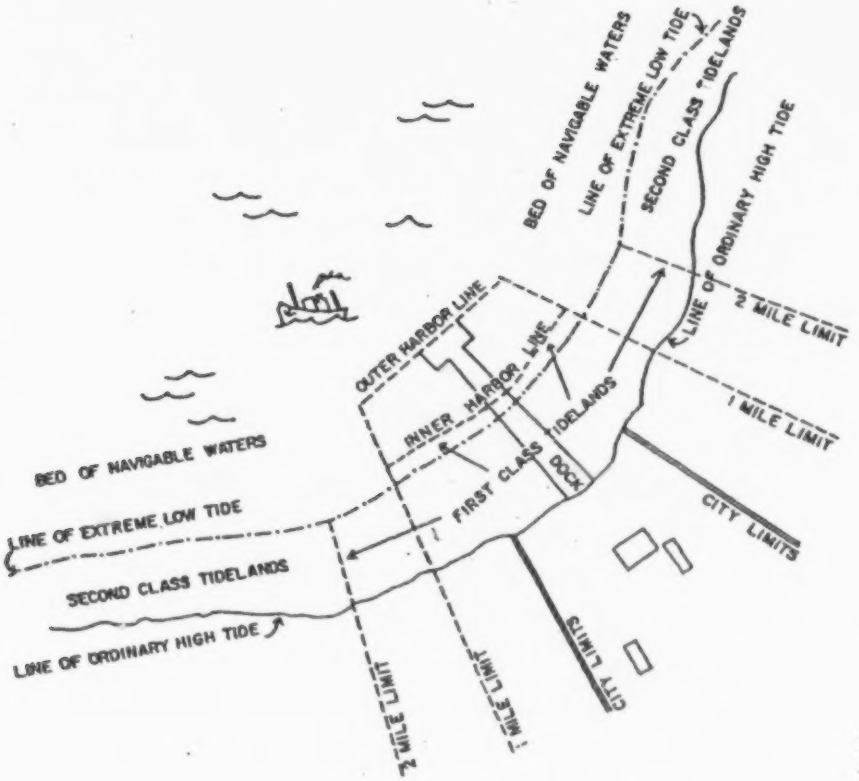
Appendix E-1

HARBOUR LINES AND THE PUBLIC TRUST DOCTRINE IN WASHINGTON NAVIGABLE WATERS

* * *

Harbour Lines

FIGURE 1
SCHEMATIC DIAGRAM OF
HARBOR LINES AND TIDELANDS



Appendix F-1

THE DISPOSITION OF TIDELANDS AND SHORELANDS

WASHINGTON STATE POLICY

1889-1982

Kenan R. Conte

November 1982

Appendix F-2

* * *

WASHINGTON STATE

1889-1927

Tideland and Shoreland Sales Policies-The First Legislature, 1889-1890.

The first Legislature of the State of Washington convened in late 1889. Before adjourning, this Legislature would establish sales policies with far reaching effects on tidelands and shorelands for many years to follow.

The same interests were represented in the 1889-1890 Legislature as were at the Convention. In fact, some of the Convention delegates actually returned as legislators. Loyalties changed significantly, however, when a group of Eastern Washington legislators recommended that tidelands be sold at public auction with no preference rights to purchase. This was all that was required for the abutting land owners and the owners of improvements, both of whom wanted a preference right to purchase, to join forces (Nesbit, 1961, p 317, 318). The outcome of the first legislative session indicates, in part, the strength of their lobby.

The 1890 Legislature approved an act entitled: "Tide And Shore Lands; Appraisement And Disposal Of" (*Laws of Washington*, 1890). Section One of this act stated that "the tide and shore lands in the State of Washington shall be appraised, and the same shall be disposed of by the Commissioner of Public Lands as in this act provided."

Three bodies were established to deal with the sale of tidelands and shorelands: 1) The Board of Appraisers were to plat and appraise tidelands and shorelands, 2) The Commissioner of Public Lands was to conduct the sale, and 3) The Board of Equalization was to help administer the land (Sections 1-3).

In Section 4, the Legislature set about dividing tidelands into three classes:

1. First class tidelands were those in front of or within two miles on either side of a city.

2. Second class tidelands were those which were greater than two miles from a city and which had improvements on them

3. Third class tidelands were all others not falling in the above categories.

Section 4 went on to stipulate that the first class tidelands were to be surveyed and appraised as soon as possible. Second class tidelands were to be surveyed and appraised if someone owing improvements on them applied to purchase them. Finally, third class tidelands were to be surveyed and appraised if someone owning improvements on them applied to purchase them. Finally, third class tidelands were to be surveyed and appraised if the applicant would deposit a sum of money sufficient to cover the costs of doing so.

Section 8 required a three week public notice of the application so that anyone who desired could contest the sale.

Section 11 established one of the more interesting policies concerning tidelands and shorelands although, as will be discussed shortly, it is unclear that this act applied to shorelands. This section gave the owners of improvements a sixty day preference period to purchase the tidelands which they occupied. If they failed to purchase, then the abutting upland owner would have the next preference right to purchase. Finally, if the people with preference rights did not purchase the tidelands, then Section 13 allowed for their sale to the public by sealed bid.

A number of comments should be made concerning this first legislative act allowing for the sale of tidelands and,

possibly, shorelands. While the first several Legislatures were at times unclear and inconsistent in their policies concerning these lands, there is little question that the 1890 Act set the tone of tideland and shoreland policy for many years to come.

The key policy set forth by the 1890 Legislature is, of course, the simple fact that they decided to sell public tidelands and shorelands into private ownership. It is clear that this policy revolved around the strong lobby put forth by the owners of improvements on tidelands as well as the owners of uplands abutting the tidelands, both development oriented interests. This is most easily noted by two aspects of the 1890 legislation. The first aspect was the priority given to the sale of each class of tideland, and the second was the preference right to purchase which was awarded to certain individuals. In terms of priority, first class tidelands (in front of or within two miles of a city) were to receive the most immediate attention. They were to be surveyed and appraised immediately, presumably at the State's expense. These tidelands were, of course, the centers of development and commerce which were central to the controversy which had raged for some years. Second class tidelands (greater than two miles from a city and with improvements) were to be surveyed and appraised upon request, and again, at the State's expense. These lands were probably not centers of controversy, but were important to the owners of the improvements in question. Finally, third class tidelands held no improvements and they were to be surveyed and appraised upon request and at the expense of the applicants. The second aspect of the legislation which indicates the strength of the lobby involved is the preference clause. The owners of improvements, the chief lobbyists at both the Constitutional Convention and the first Legislative Session, were given the first preference to purchase the tidelands they occupied. The abutting upland owners (riparian owners) were given the second preference right to purchase. This is particularly significant in view of Articles XVII and XXVII of

the *Constitution*. While these articles clearly deny special constitutional rights to riparian owners, the 1890 act of the Legislature established, by virtue of the preference clause, special rights to these individuals to purchase tidelands and shorelands. The owners of improvements were not riparian owners; however, they too were granted special rights above and beyond those rights afforded the general public.

A more subtle, but still important, provision of the 1890 act is found in Section 13. This section allowed tidelands to be sold to the public by sealed bid if the preference rights were not exercised. This provision indicates that the Legislature was not simply accommodating a strong lobby but was, in fact, adopting a more general pro-sales policy, one which would facilitate the growth and development which the State depended upon.

* * *

The Establishment of Harbor Areas - The Harbor Line Commission.

The 1890 Legislature approved two acts concerning harbor areas. The first, titled "Harbor Line Commissioners" established the Harbor Line Commission and instructed it to set harbor lines as per the Constitution. The second, titled "Public Ways Across Tide Flats Near Towns" instructed the Commission to establish "public ways" of fifty to one thousand feet in width across tidelands (Laws of Washington, 1890). The latter act is of particular interest in that it represents one of the earliest legislative acts designed to protect public use of and access to the industrially oriented harbors.

The *First Report of the Harbor Line Commission of the State of Washington* (1891), contains a detailed report of the Commission's activities. This report explains that the Harbor Line Commission first met in Seattle on July 25, 1890. They decided to begin their work there "on account of the number, value, and extent of its commercial interests, as well as its

aggregate of business and population" (p 9). Realizing that the tidelands could not be sold until the harbor lines were established, the commissioners went on to comment:

> large numbers of men were then and are still waiting for an opportunity to acquire title of these tide flats, in order that they may establish thereon various industrial and manufacturing enterprises of great importance to the city and state (p 9).

Presumably the commissioners were referring to those tidelands greater than six hundred feet landward of the inner harbor line.

As reported in the *First Report of the Harbor Line Commission of the State of Washington* (1891), the Commission went into great detail determining how to go about its tasks, including investigating how harbors were established in London, Liverpool, Boston, New Jersey, Maryland, Virginia, New York City, California, and San Francisco. Based upon their investigations, the Commission decided to establish two harbor lines: an outer harbor line and an inner harbor line. The outer harbor line was established in Elliot Bay (Seattle) in water fifty feet deep at low water. The inner harbor line was established six hundred feet landward of the outer harbor line (the maximum allowed in the *Constitution*) which put it at a "median distance between high and low water" (p 26). The area beyond the outer line as well as the area between the two lines ("the harbor area") was, of course, reserved from sale by the *Constitution*.

As established, the inner harbor line cut through two miles of Railroad Avenue and thirty-five wharves (p 26). The owners of these improvements had lobbied considerably with the Commission, as they had at the Constitutional Convention, to set the lines further off shore. In fact, they wanted the inner harbor line rather than the outer harbor line set in a minimum

of fifty feet of water at low tide (p 13). Their motives did not escape the Harbor Line Commissioners who stated:

> the object of the [owners] proposition was to place the inner line beyond any wharves or other structures upon the present line of deep water and virtually leave the entire control of the commerce of the city in the hands of those who now occupy the water front (p 13).

The Harbor Line Commissioners went on to express their view of the developers' proposal:

> The utter absurdity of the proposition advanced and strenuously supported by those parties must be apparent to every intelligent man who gives the subject proper consideration (p 13).

Opponents of the Harbor Line Commission immediately obtained an injunction prohibiting any further action. Filed in the King County Superior Court of Judge J.I. Litchenberg, the case of *Yesler v. The Harbor Line Commission* (1891) was the first of several suits filed against the Commission. Nesbit (1961) points out that while the Harbor Line Commission lost the case in Judge Litchenberg's court, it won, on July 5, 1981, an appeal to the State Supreme Court (*Harbor Line Commissioners v. State*, 1891). The State Supreme Court opinion was written by Justice Hoyt who, in 1889, had been the president of the Constitutional Convention (p. 332, 333). The case was then appealed to the U.S. Supreme Court where it was eventually dismissed (*Yesler v. The Harbor Line Commission*, 1892).[1]

Due to much litigation and maneuvering by tideland developers, the Seattle harbor lines were not established prior to the

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[1] Today, *Yesler v. The Harbor Line Commission* is regarded as one of several court cases which confirm the nonriparian nature of Washington State.

dissolution of the Harbor Line Commission in January 1893. That task then fell upon the Board of State Land Commissioners who, according to Nesbit (1961), established the lines in a manner more palatable to the development interests (p 339).

* * *

Tideland and Shoreland Sales Policies - The 1895 Legislature.

The 1895 Legislature left the basic policies concerning the disposition of tidelands and shorelands intact. However, there were some changes worthy of mention. For example, the Legislature turned the responsibilities of the Board of Appraisers and the Board of Equalization over to the Board of State Land Commissioners (*Laws of Washington*, 1895, Section 53). In addition, tidelands and shorelands were, for the most part, dealt with in separate sections. This adds weight to the suggestion that even then the former referred to tidal water while the latter referred to non-tidal waters.

In the *Laws of Washington*, 1895, tidelands were dealt with in Sections 52, 53, 54, 61, 62, 65, 66, 70 and 72. The significant changes from the 1890 laws are discussed below.

Where in 1890, tidelands and shorelands were divided into classes in the same section, they were divided separately in 1895. Section 52 described first class tidelands as those in front of or within two miles of a city. In addition, tidelands and portions of bedlands lying between the "line of mean low tide and the inner harbor line," where harbor lines were established, were also classified as first class tidelands. Second class tidelands were then defined as those having valuable improvements on them on or prior to March 26, 1890. Third class tidelands were all those which didn't fall into the above categories. There is one significant point concerning these definitions. Tidelands, in areas where harbor lines had been established, now included the area between the line of mean

low tide and the inner harbor line. This change was requested by the Commissioner of Public Lands, W.T. Forrest. Forrest, in the *Second Biennial Report of the Commissioner of Public Lands* (1892) noted that the 1890 law needed amendments to, among other things, "determine the right of the state to dispose of the land situated between the line of ordinary low tide and the harbor line" (p 46). Prior to this, these lands were platted, as required by law, and sold. While the plats, and thus the sales, often excluded out from the inner harbor line and often included bedlands, this definition change eliminated any question of the State's authority to extend sales so far off shore. This change is indicative of the liberal attitude toward sales that existed at the time as well as the desire to stimulate commerce and development.

Sections 53 and 54 instructed the Board of State Land Commissioners to "survey, plat, examine and appraise" first class tidelands and to lay out, on those tidelands, streets and alleys for public use. Where improvements existed in these areas, the owners were given the prior right to purchase the tidelands.

The preference right to purchase tidelands of the first class remained unchanged except that it was stipulated that the preference right would only apply to owners of improvements in place on or before March 26, 1890.

Section 60 stipulated that tidelands not sold by preference right could be sold by public auction. This section is significant, just as the similar 1890 provision was, in that it indicates that the State was not only selling shorelands to accommodate existing commercial development, but was actually encouraging it.

* * *

While guarding against the uncompensated use of tidelands and shorelands, the 1890 and 1895 Legislatures were

clearly liberal toward their sale. First class tidelands and shorelands were to be sold at appraised values. However, second class tidelands and shorelands were to be sold at the minimal value of five dollars per acre and third class tidelands were to be sold at five dollars per chain.

The 1895 Legislature's treatment of shorelands brings up the interesting question of whether these sales were mandatory or permissive (at the discretion of the Board of State Land Commissioners). This issue would be debated many years later, as will be discussed in later chapters. Significantly, Section 73 indicated that shorelands within two miles of a city (i.e., first class) were to be surveyed and platted only when the Board of State Land Commissioners deemed it in the best interest of the State. Clearly, it was not mandatory that these shorelands be sold. However, the sale of shorelands greater than two miles from a city (i.e., second class), discussed in Section 77, seemed more mandatory than permissive. This section stated that these shorelands "shall be disposed of upon application . . . the owner of the upland . . . shall have the right to purchase."

Similar terminology ("shall be", "shall have", etc.) was associated with all classes of tidelands, indicating that their sale may have been mandatory upon request as well. Whether it was the intent of the Legislature to make this distinction between first class shorelands and all other shorelands and tidelands has become unclear over the years. It seems likely that this is more indicative of a relatively young, law-making body in the midst of an ongoing process of policy development. The permissive approach to selling shorelands of the first class, if that was the intent, lasted only two years, until 1897. In addition to changing this policy, the 1897 Legislature appears to have been interested in consolidating and simplifying the laws pertaining to tidelands and shorelands altogether.

Clarification of Tideland and Shoreland Sales Policies-The 1897 Legislature.

The 1897 Legislature consolidated the tideland and shoreland policies (just as they were prior to 1895) and left no questions about definitions. *The Laws of Washington*, 1897, Chapter 89, Section 4, defined tidelands as being "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide" (later changed to extreme low tide). Shorelands were defined as "lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow." While we cannot be positive of the intent prior to 1897, it was clear that from 1897 on, the term "shore" would refer to nontidal waters and "tide" would refer to tidal waters.

Section 39 of the same act defined first class tidelands and shorelands as those in front of or within two miles of an incorporated city. First class tidelands and shorelands also included the area between the ordinary high water mark and the inner harbor line in areas where harbor lines were established. Second class tidelands and shorelands were all those not included in the category of first class. Significantly, the definitions no longer related to improvements and the category of third class lands was eliminated altogether.

Like the earlier laws, first class tidelands and shorelands, once surveyed, platted, examined and appraised, were available for sale first to the owners of improvements placed there prior to March 26, 1890, and secondly to the abutting upland owners (Section 45). Section 47 allowed for sale of first class shorelands where no applications to purchase had been submitted. In these cases, sales would be in the same manner as for school and granted lands, i.e., by public auction.

In the 1897 act, second class tidelands and shorelands were to be sold, without platting, at five dollars per lineal chain (Section 48). This was changed in 1899 so that second class

tidelands and shorelands would be sold by public auction, but for not less than five dollars per lineal chain (*Laws of Washington*, 1899, Chapter 83). This change was requested by Commissioner W.T. Forrest, in the *Fifth Biennial Report of the Commissioner of Public Lands* (1898), "in order to prevent the further sale of tidelands of the second class for less than their real value to the state" (p 62).

Section 50 allowed for the leasing of tidelands and shorelands which were not sold earlier and for which there were no pending applications for purchase.

Clearly, by 1897 the law provided for the sale of all classes of tidelands and shorelands. This is particularly interesting in the case of shorelands. With the possible exception of Lake Washington, Lake Union and the Upper Columbia River, most shorelands around lakes and rivers in the State did not hold the same commercial and economic potential that first class tidelands did. In fact, on most lakes and rivers in the State commerce was often restricted to travel; it was easier than building roads. While travel on these lakes often required access to deep water and hence docks, this concern was only peripheral to the major economic issues concerning their first tidelands. Nonetheless, the Legislature adopted a liberal policy towards selling all classes of tidelands and shorelands even though the provisions for sale which were enacted were designed to meet the needs of industry associated with first class tidelands.

In consolidating the laws, as the 1897 Legislature did, the permissive terminology applied to first class shorelands gave way to the more mandatory "shall" language which had been applied to other tidelands and shorelands. While many years later, people would question whether these laws made sales mandatory, it appears that they were interpreted as mandatory at the time. For example, in the *Fifth Biennial Report of the Commissioner of Public Lands* (1898), Commissioner Forrest

expressed concern to the Legislature that shorelands along the Columbia River were being purchased by speculators with the result that access was being cut off for local farmers. He then recommended that the Legislature remove all unsold shorelands above Vancouver from the market (p 64). Clearly, Commissioner Forrest did not feel he had the authority to withhold these sales; he had to request that the Legislature take this action.

The basic policies established between 1890 and 1897 lasted many years. In fact, it was not until 1927 that there was any major review of the tideland and shoreland laws and, even then, the changes, in terms of allowing sales, were not significant.

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Supreme Court of the United States

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ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

MARY V. DiCRESCENZO
THOMAS WARD
THE NATIONAL ASSOCIATION OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0250

KENNETH B. BLEY
(Counsel of Record)
COX, CASTLE & NICHOLSON LLP
2049 Century Park East, 28th Floor
Los Angeles, CA 90067
(310) 284-2231
Attorneys for THE NATIONAL ASSOCIATION OF HOME BUILDERS

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BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioner and has filed the letters of consent with the Clerk of the Court.[1]

THE NAHB'S INTEREST ARISES FROM ITS MEMBERS' CONCERNS AS TO THEIR ABILITY TO HAVE GOVERNMENTAL LAND USE DECISIONS REVIEWED AS A VIOLATION OF SUBSTANTIVE DUE PROCESS

The NAHB represents over 205,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the protection provided to landowners when, as in the case at bar, a court holds that the Takings Clause subsumes within it any possible claim of a violation of the substantive due process portion of the Fourteenth Amendment.

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1 No counsel for either party authored any part of this brief. No person or entity other than the NAHB has made any monetary contribution to the preparation or submission of this brief.

The NAHB has appeared before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)[2], *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

The petitioner in the case at bar has submitted three questions to the Court. The NAHB submits its *amicus curiae* brief in support of the petition with respect only to the third question presented – whether the protection provided by the substantive due process portion of the Fourteenth Amendment is subsumed within that provided by the Takings Clause – because the resolution of the question will, as a practical matter, determine whether a landowner will ever be able to state a claim for relief which may be considered by a federal court in light of the Court's decision in *Williamson County*, *supra*.

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2 The Court's opinion cited the NAHB's brief. 483 U.S. at 840.

SUMMARY OF THE ARGUMENT

The normal reasons for the Court's decision to grant its writ of certiorari are set out in Rule 10. The NAHB contends that the Court's review is called for under both subsections (a) and (c) in that the Ninth Circuit's opinion highlights a conflict between a substantial number of the Circuits and because it presents an important question of federal law which, although not decided explicitly by the Court, is nevertheless in conflict with a number of its decisions.

ARGUMENT

I. WHETHER THE TAKINGS CLAUSE SUBSUMES WITHIN IT THE SUBSTANTIVE DUE PROCESS PORTION OF THE FOURTEENTH AMENDMENT IS A MATTER OF SHARP DISAGREEMENT AMONGST THE CIRCUITS

A. There Is An Explicit Conflict Amongst The Circuits.

The Ninth Circuit has interpreted the Court's decisions in *Graham v. Connor*, 490 U.S. 386 (1989), and *Albright v. Oliver*, 510 U.S. 266 (1994), to mean that no claim for relief in a land use case can be stated under the substantive due process portion of the Fourteenth Amendment because the Takings Clause provides an explicit textual source of constitutional protection. *Armendariz v. Penman*, 75 F.3d 1311, 1324 (9th Cir. 1996), cited in the case at bar at 307 F.3d at 982.

The Ninth Circuit does not stand alone. *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

On the other hand, the other Circuits which have addressed the question have come to the opposite conclusion and have held that a landowner may proceed with both substantive due process and takings claims.

The Fifth Circuit, after reviewing the conflicting law from other Circuits, stated:

> Although the above cited cases involved factual settings different from Appellants', we can say that a blanket rule that under *Graham*, the Takings Clause subsumes any substantive due process claim relating to a deprivation of properties is both inconsistent with our precedents and with the approaches taken by a majority of other circuit courts.

John Corp. v. City of Houston, 214 F.3d 573, 583 (5th Cir. 2000) [footnote omitted]. The Fifth Circuit reaffirmed its position only two weeks ago in *Sandy Creek Investors, Ltd v. City of Jonestown*, _F.3d_, 2003 WL 1469455 (5th Cir. March 24, 2003), at 6.

In *Triomphe Investors v. City of Northwood*, 49 F.3d 198, 201 (6th Cir.), *cert. denied*, 516 U.S. 816 (1995), the Sixth Circuit stated:

> Ordinarily, a party must seek compensation through the procedures established by the state and cannot bring a federal constitutional takings claim until he or she has been denied

> compensation through these procedures. . . . However, under current law of this circuit, the substantive due process claim appears to be ripe.

In *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997), the District of Columbia Circuit stated: "But in this circuit at least, under [an earlier opinion], the requirements of the Takings Clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition."

The First Circuit distinguishes between substantive due process and takings claims but evaluates them using the same decisional framework. *South County Sand & Gravel Co., Inc. v. Town of South Kingstown*, 160 F.3d 834, 835 (1st Cir. 1998).

The Seventh Circuit recognizes the potential for both substantive due process and takings claims but applies the same ripeness requirements imposed by this Court in *Williamson County*, *supra*. *Forseth v. Village of Sussex*, 199 F.3d 363, 368-69 (7th Cir. 2000).

Finally, the Eleventh Circuit differentiates between what it has described as "takings" claims, "due process takings" claims and "arbitrary and capricious due process" claims. *Eide v. Sarasota County*, 908 F.2d 716, 720-22 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). A plaintiff is entitled to assert both a takings and a due process claim. *Corn v. City of Fort Lauderdale*, 95 F.3d 1066, 1076 (11th Cir. 1996), *cert. denied*, 522 U.S. 981 (1997). However, the Eleventh Circuit allows only "arbitrary and capricious due process" claims; a "takings"

claims subsumes within it a "due process takings" claim. *Villas at Lake Jackson, Ltd v. Leon County*, 121 F.3d 610, 612 (11th Cir. 1997).

B. A Number Of Circuit Courts Have Addressed Substantive Due Process Claims On Their Merits.

Several Circuits have reached the merits of substantive due process claims in the land use context without addressing the question of whether those claims were subsumed within the Takings Clause. *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 503-505 (2d Cir. 2001); *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir.), *reh'g denied*, – F.3d –, 2003 WL 1595871 (3d Cir. 2003); *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440-441 (4th Cir. 2002); and *Bituminous Materials, Inc. v. Rice County*, 126 F.3d 1068,1070-1071 (8th Cir. 1997).

In order to ripen a takings claim, a plaintiff must seek compensation through the procedures provided by the state. *Williamson County*, *supra*, 473 U.S. at 194-197. Ripeness in the land use context is jurisdictional. *Forseth*, *supra*, 199 F.3d at 368; *Samaad v. City of Dallas*, 940 F.2d 925, 934 (5th Cir. 1991); *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498, 500 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); and *Greenbriar, Ltd v. City of Alabaster*, 881 F.2d 1570, 1573 n. 7 (11th Cir.), *reh'g denied*, 893 F.3d 346 (11th Cir. 1989). Finally, appellate courts are required to ensure that they have jurisdiction before reaching the merits of a dispute. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 831 (1999).

In each of the land use cases cited above, the plaintiff had filed its complaint directly in federal court. In none of the opinions did the Court of Appeals even mention the possibility that the case was not ripe because the plaintiff had failed to make use of state provided procedures, something which would have been required had the substantive due process claim been subsumed within the Takings Clause. In each case, the Court of Appeals decided the case on its merits; had the case been unripe, the only proper procedure would have been to dismiss – not decide – the case. *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726, 739 (1998); and *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998). There is no different rule in land use cases. *Sandy Creek Investors*, *supra*, at 6-7; *Forseth*, *supra*, 199 F.3d at 367, *Bickerstaff Clay Products Co., Inc. v. Harris County*, 89 F.3d 1481, 1491 (11th Cir. 1996); and *Southern Pacific Transportation*, *supra*, 922 F.2d at 507.

The fact that the Courts of Appeals reached the merits argues that they believed that substantive due process claims are **not** subsumed within the Takings Clause, contrary to the Ninth Circuit's position.[3]

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[3] In fairness, it should be noted that courts are not bound by exercises of jurisdiction where that jurisdiction was not questioned but neither should a court – including this Court – "'disregard the implications of an exercise of judicial authority assumed to be proper' in previous cases." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 522 (1998), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 307 (1962).

II. THIS COURT HAS REVIEWED CLAIMS IN THE LAND USE CONTEXT UNDER THE SUBSTANTIVE DUE PROCESS PORTION OF THE FOURTEENTH AMENDMENT

A. This Court Has Reviewed Claims In The Land Use Context Under Both Substantive Due Process And The Takings Clause

In *Mugler v. Kansas*, 123 U.S. 623 (1887), the Court addressed a Kansas statute prohibiting the manufacturer of intoxicating liquor which prohibited Mugler from making use of his brewery. The Court analyzed the validity of the statute under both substantive due process (661-667) and the Takings Clause (667-670).

The Court analyzed the denial of the land use project in *Williamson County*, *supra*, as both a takings claim (473 U.S. at 186-197) and as a substantive due process claim (473 U.S. at 197-200).

Further, the Court has frequently analyzed claims involving money (as opposed to land) to determine whether a taking has occurred or whether the right to substantive due process has been violated. *See*, *e.g.*, *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 (1993) (substantive due process, 636-641; takings, 641-647). In *Eastern Enterprises*, *supra*, four Justices evaluated the plaintiff's claim under the Takings Clause while five Justices evaluated it under the substantive due process portion of the Fourteen Amendment.

B. This Court Has Repeatedly Analyzed Claims In The Land Use Context To Determine Whether A Violation Of Substantive Due Process Has Occurred.

The Court has analyzed governmental actions in the land use context to determine if a substantive due process violation has occurred in both its earliest and its latest zoning cases. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928), and Section III of the Court's decision in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. _ (March 25, 2003).

It should also be noted that the concurring opinion in *Cuyahoga Falls* by Justice Scalia, joined in by Justice Thomas, mentioned the Takings Clause and then argued that the Equal Protection Clause subsumed within it substantive due process claims. Thus, the Court is well aware that there is an issue of whether a substantive due process claim can be asserted in the land use context.

III. CONCLUSION

If every claim involving governmental regulation of land use must be brought under the Takings Clause and if over a hundred years of judicial history is to be reversed, then it should be the pronouncement of this Court which does so. The explicit and implicit conflicts between the Circuits and the dissonance of the position taken by the Ninth Circuit with opinions by this Court present an important question of federal law which has not been, but should be, settled by the Court.

Accordingly, the NAHB respectfully requests that the Court grant Esplanade Properties' petition for writ of certiorari.

DATED: April 4, 2003

Respectfully submitted,

Mary V. DiCrescenzo
Thomas Ward
The National Association
Of Home Builders

Kenneth B. Bley
(Counsel of Record)
COX, CASTLE &
NICHOLSON LLP
Attorneys for Amicus Curiae
The National Association of
Home Builders

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No. 02 -1304

In the
Supreme Court of the United States
October Term, 2002

ESPLANADE PROPERTIES, LLC,
Petitioner,
v.
CITY OF SEATTLE,
Respondent.

On Petition for Writ of *Certiorari* to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Counsel for Amicus Curiæ

MICHAEL E. MALAMUT
Counsel of Record
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Tel.: (617) 695-3660
Fax: (617) 695-3656

QUESTIONS PRESENTED

Amicus Curiæ New England Legal Foundation ("NELF") adopts the questions presented by Petitioner Esplanade Properties, LLC ("Esplanade"). This brief *amicus curiæ* focuses on Esplanade's first two questions presented:

1. May a federal court impose upon the state a unique, restrictive version of the public trust doctrine that is incompatible with the state's own doctrine and with the decisions of this Court upon which the state's doctrine is premised?

2. Whether a federal court may modify a state's long established public trust doctrine and declare the doctrine a "background principle of the state's law of property" that allows local governments to preclude any economic use of private tidelands that interferes with public recreation without incurring an obligation to pay just compensation?

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BRIEF OF *AMICUS CURIÆ* NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIÆ*[1]

Amicus seeks to bring to the Court's attention its views, and those of its supporters, concerning the effect of the public trust doctrine as a background principle of state law on the takings clause under the Fifth and Fourteenth Amendments to the United States Constitution.

Amicus Curiæ the New England Legal Foundation ("NELF") is a non-profit, public interest law firm,

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1 Pursuant to Supreme Court Rule 37.6, counsel for *amicus* states that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.2 (a), counsel for *Amicus* has secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

incorporated in Massachusetts in 1977. It is headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth for New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF's members are affected by the real estate development climate in New England, which depends, in part, upon the extent to which land-use agencies respect property owners' development expectations. Furthermore, some of NELF's members are directly interested in real estate development because they own, finance, develop, and manage real estate. For those reasons, NELF's members are concerned about the issues presented this case.

NELF has regularly appeared in state and federal courts, as party or counsel, in cases raising issues of general economic significance to the New England and national business communities. *See, e.g., Green Tree Fin. Corp. v. Bazzle, cert. granted,* 123 S. Ct. 817 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *Crosby v. National Foreign Trade Council,* 530 U.S. 363 (2000); *Estados Unidos Mexicanos v. DeCoster,* 229 F.3d 332 (1st Cir. 2000); *Bessette v. Avco Fin. Servs.,* 230 F.3d 439 (1st Cir. 2000), *cert. denied,* 532 U.S. 1048 (2001); *Greater Boston Real Estate Board v. Department of Telecomm. & Energy,* 438 Mass. 197, 779 N.E.2d 127 (2002); *Chandler v. County Commrs.,* 437 Mass. 430, 772 N.E.2d 578 (2002).

Amicus believes that private property and its protection are important building blocks of democracy. Private property helps distinguish individuals' interests from those of the state, and thus acts as a limit on state power. Requiring compensation for restraints on use and

enjoyment of private property caused by new and expansive interpretations of historical principles of state law such as the public trust doctrine will ensure that the burdens of achieving a socially desirable goal will be equitably allocated among all taxpayers and will ensure that the electorate makes informed decisions about policy choices and priorities.

Amicus Curiæ therefore believes that this brief may provide an additional perspective which may aid the Court in determining whether to grant the petition for a writ of *certiorari* of the petitioner, Esplanade Properties, LLC.

STATEMENT OF THE CASE

Amicus adopts the Statement of the Case contained in the Brief of the Petitioner, Esplanade Properties, LLC.

SUMMARY OF ARGUMENT

The issues raised by this case are of national importance because the Court of Appeals for the Ninth Circuit applied an overbroad interpretation of federal public trust precedents to eliminate property rights previously alienated by the state for development purposes. The decision below threatens riparian and littoral property owners nationwide who have relied on traditional interpretations of the public trust doctrine which allow states to alienate public trust property. Throughout the United States, states have alienated public trust property in order to enhance commerce and development or because the state deemed particular property non-essential to trust purposes. Thousands of property owners have purchased their property relying on historic alienations of public trust property by the states. Without federal protection for historically accurate interpretations of the public trust doctrine, the states will be free to renege on their promises to the public to

respect private rights in property that the states alienated freely and knowingly, and often for considerable compensation.

ARGUMENT

I. Federal courts need to protect property owners of former public trust properties and limited public trust properties from novel interpretations of the public trust that would retroactively eviscerate property owners' long-held expectations for productive use of their properties.

Amicus contends that the United States Court of Appeals for the Ninth Circuit erred in three principal regards. First, contrary to applicable state and federal precedents, the Appeals Court deemed the public trust unalienable, rendering all property ever subject to the public trust forever subject to interference by the government on public trust grounds. *See Esplanade Properties, LLC v. City of Seattle,* 307 F.3d 978, 985 (9th Cir. 2002) (quoting *Illinois Cent. R.R. v. Illinois,* 146 U.S. 387, 453 (1892)), *cert. pending,* No. 02-1304 (April 7, 2003, U.S.). Second, it permitted public trust considerations to obliterate any property development rights even when the state previously alienated the property in contemplation of development and development would not interfere with the public trust. *Id.,* 307 F.3d at 986. Third, it created an overly broad federal public trust doctrine that would validate expropriation without compensation of property long ago granted as private property subject to development. *Id.,* 307 F.3d at 986.

The Court of Appeals correctly considered the public trust doctrine constituted a "background principle" of Washington state law. *See Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992).

Based on its erroneous conclusions about the application of the doctrine and its implications for federal constitutional protections for private property, however, the court determined that Esplanade was barred from recovering for a categorical regulatory taking when Seattle prevented it from developing its property. *Esplanade Properties*, 307 F.3d at 986–87. *See Lucas*, 505 U.S. at 1029. The first section of the argument considers the application of the public trust to Esplanade's property—the permissibility of alienating public trust property and the right to develop private property encumbered by the public trust. The third erroneous conclusion of the court below—its federalization of an overly broad public trust doctrine—is the subject of the final section of the argument.

The Court of Appeals relied principally on the public trust doctrine as a "background principle" of state law to deny relief to Esplanade for Seattle's regulatory prohibition on any development of its property. To explain its decision, the Ninth Circuit relied on precedents taken out of context to explain the public trust doctrine, which the court described as

> "reserv[ing] a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership." "The state can no more convey or give away this *jus publicum* [aspect of the public trust doctrine] than it can 'abdicate its police powers in the administration of government and the preservation of the peace.' Instead, the state may only divest itself of interests in the state's waters in a manner that does not substantially impair the public interest.

307 F.3d at 985 (quoting *Illinois Cent. R.R. v. Illinois*, 146

U.S. 387, 453 (1892); *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998); *Caminiti v. Boyle*, 732 P.2d 989, 994 (Wash. 1998)). The Court of Appeals' use of this general language threatens private property rights to public trust property alienated by the states free of the trust (including filled property once under water) as well as property alienated by the states subject to limited public trust restrictions.

A. *The Court of Appeals erroneously limited the ability of states to alienate public trust property.*

The Court of Appeals ignored the fact that the language it quoted provides only a general rule, to which several exceptions apply. For example, the key federal case that the Court of Appeals relies on discusses the circumstances under which a state may alienate property under water free of the public trust. *Illinois Cent. R.R. v. Illinois*, 146 U.S. 387, 452 (1892). *Illinois Central* determined that the state legislature improperly granted several square miles of Lake Michigan lakebed to the Illinois Central Railroad in violation of the public trust. It explicitly approved smaller grants of public trust land to private parties where it was clear that the state legislature made a considered decision to alienate the property. 146 U.S. at 452. In fact, the leading Washington State case on public trust quotes *Illinois Central* for the proposition that the state can alienate public trust property in appropriate circumstances:

> "The control of the State for the purposes of the trust can never be lost, *except* as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987) (quoting *Illinois Central,* 146 U.S. at 453) (emphasis added), *cert. denied,* 484 U.S. 1008 (1988). *Caminiti* determined that a statute granting tideland abutters the right to build docks without payment to the state did not violate the public trust. 732 P.2d at 997.

In this case, Esplanade's predecessor purchased the property from the state as first-class tidelands[2] in fee simple absolute in 1906 pursuant to a state policy encouraging development of such property. *See* Petition at 4 (describing 1906 state sale); *Davidson v. State,* 802 P.2d 1374, 1379 (Wash. 1991); *Harris v. Hylebos Indus.,* 505 P.2d 457, 461 (Wash. 1973); *Puget Mill Co. v. State,* 160 P. 310, 312 (Wash. 1916);[3] *State v. Sturtevant,* 135 P. 1035, 1040 (1913);[4] *Eisenbach v. Hatfield,* 26 P. 539, 543

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2 First-class tidelands are defined as:

> [T]he beds and shores of navigable tidal waters belonging to the state, lying within or in front of the corporate limits of any city, or within one mile thereof upon either side and between the line of ordinary high tide and the inner harbor line, and within two miles of the corporate limits on either side and between the line of ordinary high tide and the line of extreme low tide.

Wash. Rev. Code § 79.01.020.

3 Now it is no longer an open question in this state as to the nature of the title vested in grantees of second-class tide and shore lands [let alone in first-class tidelands more easily developable by state law] by deeds from the state absolute in form . . . . The decisions of this court lead to no other conclusion than that the state authorities have the power to, and when conveying lands of this nature by deeds absolute in form do, vest in the grantees an *absolute fee-simple title* to such lands.

Puget Mill Co., 160 P. at 312 (emphasis added).

4 The state has invited investment in these lands

(Wash. 1891) ("[T]he right of the state to grant the navigable waters, except as restrained by constitutional checks, is as absolute as its rights to grant the dry land which it owns . . . ."). *See also* Wash. Rev. Code § 47.12.020 (tidelands alienated by Washington State not imposed with public trust unless deed from state explicitly so provides).

The court below thus failed to consider both Washington State precedents recognizing and protecting private property rights in former public trust property, including alienated first-class tidelands, and the factual history of the actual property. *See Harris*, 505 P.2d at 461 (Wash. 1973); *Puget Mill Co.*, 160 P. at 312; *Sturtevant*, 135 P. at 1040; *Eisenbach*, 26 P. at 543. The opinion below did acknowledge, in a backhand manner, that under Washington law the state may dispose of public trust property if it does so "in a manner that does not substantially impair the publicinterest." *Esplanade Properties*, 307 F.3d at 985. *See Weden*, 958 P.2d at 283 (public trust alienation permitted if "the action promotes the overall interests of the public.") (quoting *Rettkowski v. Department of Ecology*, 858 P.2d 232, 239 (1993)).[5] The Court of Appeals, however, failed to deem this vital qualification of the public trust doctrine worthy to be addressed. Even the case most heavily relied on by the Court of Appeals[6] acknowledges that the state can alienate public trust property completely free of the trust.

> upon the theory that, in private ownership, all land lying back of the inner harbor line or the line of ordinary navigation would be reclaimed and put to useful purposes.

Sturtevant, 135 P. at 1040.

5 In *Rettkowski*, the court determined that the public trust was inapplicable. 858 P.2d at 239. Understandably, any *dictum* about the public trust was terse and without nuance.

6 *Esplanade Properties*, 307 F.3d at 986–87.

Orion Corp. v. State, 747 P.2d 1062, 1072 n.9 (Wash. 1987), *cert. denied,* 486 U.S. 1022 (1988). Nevertheless, without citation to the record or discussion of the treatment under Washington State law of first-class tidelands, the Court of Appeals categorically stated that "the public trust doctrine . . . unquestionably burdens Esplanade's property." *Id.,* 307 F.3d at 986.

The Appeals Court's blithe application of the public trust to property alienated by the state long ago is of significant concern to *Amicus.* New England contains significant amounts of state-alienated public trust lands. For example, most of downtown Providence is built on filled land. *Greater Providence Chamber of Commerce v. State,* 657 A.2d 1038, 1039–40, 1044 (R.I. 1995) (fill of public trust land with acquiescence or approvalof state establishes title free and clear of public trust). The Rhode Island legislature through explicit grants has also encouraged filling of public trust property for commercial wharves and docks in other areas. *See Providence & Worcester R.R. v. Pine,* 729 A.2d 202, 205–06, 208–09 (R.I. 1999) (statutory grant of public trust property for wharf facility in East Providence, passes free and clear of trust upon filling). Similarly, much of Boston is built on fill permitted pursuant to statute. *Manning v. New England Mut. Life,* 506 N.E.2d 870, 873 (Mass. 1987) (filled tidelands of Back Bay free from public trust); *Opinion of the Justices,* 424 N.E.2d 1092, 1099–1100 & n.3 (Mass. 1981) (statute could extinguish public trust in long-filled Boston tidelands and, provided grant is sufficiently clear, submerged land below mean low tide); *Opinion of the Justices,* 424 N.E.2d 1111, 1115–16 (Mass. 1981) (similar); *Boston Waterfront Dev. Corp. v. Commonwealth,* 393 N.E.2d 356, 361, 367 (Mass. 1979) (wharves filled in Boston Harbor below mean low tide constitute fee simple subject to condition subsequent that they be used for trust purpose); *Trio Algarvio, Inc. v.*

Department of Envtl. Protection, 778 N.E.2d 529, 531–32 (Mass. App. Ct. 2002) (wharfing statute on Acushnet River in New Bedford), *review granted*, 782 N.E.2d 1083 (Mass. 2003). *See New York, N.H. & H. R. Co. v. Armstrong*, 102 A. 791, 794 (Conn. 1918) (Connecticut could grant public trust property for a public use); *Opinion of the Justices*, 437 A.2d 597, 606–08 (Me. 1981) (statute to release state public trust claims to filled tidal and submerged land permissible; "[T]he clearing of title, so that commercial and other activity may go forward, is a legitimate and important public purpose."); *State v. Central Vermont Ry.*, 571 A.2d 1128, 1133 & n.5 (Vt. 1989) (Vermont legislature may grant public trust property in fee simple conditional requiring continued use compatible with trust, open question whether legislature can grant public trust property in fee simple absolute).

Despite this historic recognition by the courts of private rights in public trust and former public trust property, New England property owners remain concerned about protecting their property from over-vigilant state action. State legislatures and regulators have on a number of occasions attempted to curtail development of historically alienated public trust lands or to appropriate such lands for public use despite the fact that the state sold the property to the current owners' predecessors for development and use. *See Bell v. Town of Wells*, 557 A.2d 168, 177–78 (Me. 1989) (statute giving public access to private beaches unconstitutional); *Trio Algarvio, Inc.*, 778 N.E.2d at 534–35 (attempt to charge owner of wharf retroactive tidewater displacement and occupation fees for public trust property filled by predecessor pursuant to statutory grant); *Purdie v. Attorney General*, 732 A.2d 442, 447 (1999) (statute moving public trust boundary upland to highest high tide from mean high tide unconstitutional); *Opinion of the Justices*, 649 A.2d 604, 609–11 (N.H. 1994)

(similar); *Providence & Worcester R.R.*, 729 A.2d at 208–09 (regulatory attempt to limit statutory wharfing grant).

Strong federal court precedent providing remedies for regulatory takings of former public trust property and private property subject to limited public trust restrictions remain necessary to enforce property owners' expectations. The decision below, if allowed to stand, would effectively permit states to change their public trust doctrines retroactively to re-possess long ago alienated property without compensation and without allowing a federal remedy. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (O'Connor, J., plurality opinion) (retroactive application of novel legal doctrines discouraged).

B. The Court of Appeals erroneously determined that the existence of a public trust interest in state alienated property warranted the government's complete prohibition on use of the property.

In this case, the Court of Appeals determined that Esplanade's proposed houses might interfere with recreation at a park near the property (a novel public trust use).[7] The court therefore determined that Seattle's

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7 The *Orion Corp.* opinion heavily relied upon by the Court of Appeals recognized the novelty of recreational use as a ground for exerting the public trust, in light of the traditional grounds of navigation and fishing. *Orion Corp.*, 747 P.2d at 1073 & n.10. *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239, 240 (1992); James L. Huffman, *Trusting the Public Trust to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565, 571–72 (1986); James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171, 190–91, 211 (1987); Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust*

prohibition of any use of Esplanade's property was consistent with the public trust, even though Washington State had previously alienated the property for development purposes and Seattle had zoned the property residential:

> [B]ecause Esplanade's tideland property is navigable for the purpose of public recreation (and for fishing and general recreation . . .) and located just 700 feet from Discovery Park, the development would have interfered with those uses, and this would have been inconsistent with the public trust doctrine. Therefore, Esplanade's development plans never constituted a legally permissible use.

Esplanade Properties, 307 F.3d at 987.

Even if the public trust applied to Esplanade's property, the mere recitation of the doctrine is insufficient to justify denial of any possible use of the property. The case most heavily relied on by the Court of Appeals in fact acknowledged that, when the state alienates property subject to the public trust, the government must permit the property owner some economically viable trust-compatible use of the property. *Orion Corp.*, 747 P.2d at 1073.[8] In this case, Seattle

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Doctrine, 71 IOWA L. REV. 631, 632, 642–43, 710–11 (1986); Geoffrey R. Scott, *The Expanding Public Trust Doctrine: A Warning to Environmentalists and Policy Makers*, 10 FORDHAM ENVTL. L.J. 1 (1998).

8 The state argues that the public trust doctrine precludes [the property owner's] takings claim *in its entirety*. The validity of the State's argument depends on whether [the owner's] property, burdened by the trust, is functionally and economically adaptable to some present, possible, and reasonably profitable use. . . . [W]e cannot determine whether [the] property is adaptable to any

prohibited all viable use of Esplanade's property without proposing any reasonable trust-compatible use for the property. This constitutes a perversion of the public trust doctrine into an anti-growth tool, when its historical intent was to maximize efficient *use* of a significant resource. *See* Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective,* 29 CAL. W. L. REV. 239, 254 (1992). *See* Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine,* 71 IOWA L. REV. 631, 647 (1986). Thus, if the Court of Appeals decision in this case remains in effect, it could portend an end to federal court protection of property rights in property now or previously covered by the public trust, including a great deal of property in the New England states.

II. The Court of Appeals' use of federal public trust precedents demonstrates the extent of the federal issue in this case.

The Court of Appeals in this case relied on its overbroad interpretation of the public trust doctrine to eliminate the value of property long held in private hands. The Court of Appeals' decision is significant not only because state courts often follow federal interpretation of the public trust doctrine, but also, more significantly, because it signals a federal interpretation of the public trust doctrine that disclaims Fifth Amendment takings clause protection for thousands of acres of property worth billions of dollars

While the public trust doctrine is unique in each state, *Shively v. Bowlby,* 152 U.S. 1, 26 (1894), the broad

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> use that does not impair the public trust. As a result we have remanded for a further factual determination.

Orion Corp., 747 P.2d at 1073 (citation omitted) (emphasis added).

outlines of the doctrine are similar in all the states. *Id.* The federal courts therefore act as the guardians under the Fifth and Fourteenth Amendments of private property subject to state-sanctioned deprivations made in the name of the public trust doctrine or other background principles of state law. *Palazzolo v. Rhode Island,* 533 U.S. 606, 617 (2001). State and federal courts in New England and throughout the United States follow federal public trust jurisprudence in defining the outer limits to which their state public trust doctrines can go without impairing private property rights. *See The Golden Rod,* 197 F. 830, 834 (D. Me. 1912) (citing *Illinois Central*), *aff'd,* 208 F. 24 (1st Cir. 1913); *New York, N.H. & H. R. Co.,* 102 A. at 794 (citing *Shively* and *Illinois Central*); *Opinion of the Justices,* 437 A.2d at 605, 607 (Me. 1981) (citing *Shively* and *Illinois Central*); *Opinion of the Justices,* 424 N.E.2d at 1099 n.3, 1106 (Mass. 1981) (citing *Illinois Central*); *Boston Waterfront Dev. Corp.,* 393 N.E.2d at 360, 355–56 (citing *Shively,* quoting *Illinois Central*); *Home for Aged Women v. Commonwealth,* 89 N.E. 124, 127–28 (Mass. 1909) (citing *Shively* and *Illinois Central*); *Opinion of the Justices,* 649 A.2d at 607 (N.H. 1994) (quoting *Shively*); *Greater Providence Chamber of Commerce,* 657 A.2d at 1042–43 (quoting *Shively,* citing *Illinois Central*); *Central Vermont Ry.,* 571 A.2d at 1132 (quoting *Illinois Central*).

If the decision below stands, states will be able to change their historic interpretations of the public trust and deprive property owners of property granted to them or their predecessors with the expectation of development. The need for federal protection of property rights previously affected by the public trust is by no means remote. Advocates have for over thirty years, with some success, urged the expansion of the public trust doctrine beyond its traditional confines to encourage open space and discourage property development. *See*

Cohen, 29 CAL. W. L. REV. at 240 ("[T]he public trust doctrine that is, particularly the post-1970 American case law and commentary, bears only a tangential relation to its antecedents; it is far less clear as to content, radically changed in focus, and enormously enlarged in scope . . . ."). *See also supra* note 7 (articles detailing courts' recent expansion of public trust doctrine from protection of commerce to protection of environment).

In fact, the originator of the expansive modern public trust doctrine acknowledges that his theories attempt to expand the doctrine beyond its common law roots. *See* Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 485 (1970). Ironically, "[t]he communal interests sought to be protected by the English public trust doctrine were commercial rather than environmental; it was fishing and navigation that were favored rather than recreational, aesthetic, or symbolic pursuits." Cohen, 29 CAL. W. L. REV. at 254. *See* Lazarus, 71 IOWA L. REV. at 647. The use of the public trust to prevent all property development, as in this case, is thus a novel and unprecedented expansion of state public trust law applied by a federal court purportedly protecting property rights against undue encroachments by state regulators. *See Harris*, 505 P.2d at 776 ("The notion that all tidelands must be left in their natural state is incompatible with the legislative intent on this matter, as it has been expressed in statutes since the inauguration of statehood.").

Expanding the public trust beyond its historical roots in this manner is contrary to the expectations of thousands of owners of littoral and riparian properties and properties long ago alienated (and oftentimes filled) for development at the encouragement of the state. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

This Court disfavors retroactive application of such a novel legal doctrine. *See Eastern Enterprise,* 524 U.S. at 532 (O'Connor, J., plurality opinion). Background principles of state law, for purposes of regulatory takings analysis, should constitute "common, shared understandings of permissible limitations derived from a State's legal tradition," not novel developments. *Palazzolo v. Rhode Island,* 533 U.S. at 630. Background principles cannot be "newly decreed." *Lucas,* 505 U.S. at 1029. Thus, Seattle cannot, in the name of the Washington State public trust, burden Esplanade's property development rights granted by Washington State with novel legal constructs. The Court of Appeals in this case has abdicated its federal role in protecting state-created property rights.

This case thus raises a matter of national concern that this Court has not previously considered: the extent to which federal courts will enforce owners' rights to property once or currently under water when the government granted it to them free of the public trust or subject to limited public trust protections. This Court should therefore grant *certiorari* in this case pursuant to Supreme Court Rule 10 (b) because the decision below conflicts with decisions in other jurisdictions and pursuant to Rule 10 (c) because it raises an important question of federal law.

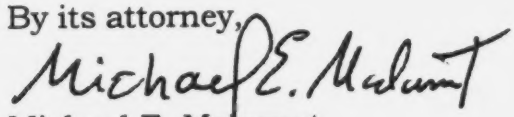
CONCLUSION

For the reasons stated above, this Court should grant Esplanade's petition for a writ of *certiorari*.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION,

By its attorney,



Michael E. Majamut
Counsel of Record
for Amicus Curiæ
New England
Legal Foundation
150 Lincoln Street
Boston, MA 02111
Telephone: (617) 695-3660
Facsimile: (617) 695-3656

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No. 02-1304

IN THE

Supreme Court of the United States

ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: April 7, 2003

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QUESTION PRESENTED

Amici curiae address only the second question presented by the Petition:

Whether the "public trust doctrine" articulated by the City of Seattle in this case as justification for denying all economically productive use of Petitioner's property constitutes a "background principle[]" of property law, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1029 (1992), sufficient to preclude consideration of Petitioner's claim under the Fifth Amendment's Takings Clause.

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF)[1] is a public interest law and policy center with supporters in all 50 states, including many in the State of Washington. WLF regularly appears in legal proceedings before federal and State courts to defend the principles of free enterprise and limited government. WLF has appeared before this Court in numerous cases involving Fifth Amendment regulatory taking claims. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302 (2002); *Palazzolo v. Rhode Island,* 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.,* 526 U.S. 5687 (1999); *Dolan v. City of Tigard,* 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). WLF is representing a South Carolina landowner whose regulatory takings claim were before the Court last year and are now before the South Carolina Supreme Court on remand. *McQueen v. South Carolina Coastal Council,* 340 S.C. 65 (2000), *vacated and remanded for reconsideration in light of Palazzolo v. Rhode Island,* 533 U.S. 943 (2001). Mr. McQueen's regulatory taking claim has been met with a "public trust doctrine" defense almost identical to the one raised herein.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study,

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission of this brief.

such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

Amici are concerned that if the Ninth Circuit's decision is allowed to stand, governments seeking to avoid regulatory taking claims will have been handed a recipe for ensuring that all such claims are defeated. It is uncontested in this case that Petitioner paid substantial sums for its property and, as a result of regulations imposed by the City of Seattle, has been denied all economically productive use of that property. Nonetheless, it has been denied all compensation for its loss on the ground that allowing Petitioner to develop its land would cause some amount of environmental harm. *Amici* do not dispute that government has the right to invoke an environmental rationale as the basis for prohibiting a landowner from developing his property. Nonetheless, when the forms of development thus blocked have been approved for numerous similarly situated landowners, *amici* believe that the landowner is entitled to be compensated for his losses. *Amici* oppose efforts by governments to latch onto a newly-discovered "public trust doctrine" as a means of avoiding compensation and thereby "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

Amici have no direct financial interest in the outcome of this case. They are filing due solely to their interest in protecting the private property rights of all Americans. *Amici* are filing this brief with the consent of both parties. The written consents have been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby adopts by reference the Statement of the Case contained in the Petition.

In brief, Petitioner Esplanade Properties ("Esplanade") owns property along the shore of the harbor of Respondent City of Seattle. The land is classified as first class (*i.e.*, urban) tidelands; it is dry for half of the day during low tides and is submerged in water for the other half of the day during high tide.

Esplanade purchased its property in 1991 for $40,000, with plans to develop the property as residential housing. Esplanade's chain of title dates back to 1906, when its predecessor in interest purchased the property from Seattle. During the past century, Seattle's tidelands have been extensively developed, transforming Seattle into one of the leading port cities in the nation. Indeed, it was precisely to encourage such development that Seattle sold off much of its tidelands.[2]

At the time the 1991 purchase, Esplanade's property was zoned SF 7200, meaning that the only permissible

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[2] Appendix F to the Petition is an authoritative history of policies adopted by the State of Washington to encourage development of the State's tidelands. Kenan R. Conte, *The Disposition of Tidelands and Shorelands: Washington State Policy 1889-1982,* Nov. 1982. There is no serious dispute of Conte's conclusions: the Washington legislature at the turn of the 20th century adopted a policy of encouraging the sale of tidelands into private hands, a "policy which would facilitate the growth and development which the State depended on." Pet. App. F-5.

development was single-family residential housing, medium density. Pet. App. C-2. The property was also subject to the state Shoreland Management Act (SMA), RCW 90.58, which had been adopted by the Washington legislature in 1972 to control shoreland development. Also, Seattle had adopted regulations (Seattle's Shoreland Master Program, or "SSMP") to implement the SMA. As the district court noted, the SSMP as of 1991 "seemingly allowed above-water residential construction" on Esplanade's property. Pet. App. C-2.

Accordingly, soon after purchasing its property Esplanade submitted a plan to Seattle to construct nine above-water residential houses. But by 1993, it became increasingly clear that Seattle would not permit any houses to be built on the property. Seattle zoning regulations require single-family homes to have on-site parking, but Seattle interpreted the SSMP as prohibiting parking built over water in a residential zone. *Id.* That interpretation prohibited any residential development, since it obviously was not possible to comply both with a rule *requiring* on-site parking and a rule *prohibiting* on-site parking. Moreover, that interpretation effectively prohibited *any* economically beneficial use of the property, because the property was zoned for residential uses only. Esplanade continued to seek approval of its development plans for several more years, but those efforts proved fruitless. In 1998 Seattle canceled Esplanade's development application on the ground that Esplanade had failed to address several design issues raised by the City -- most prominently, the parking issue. *Id.* at C-4 - C-5.

Esplanade thereafter filed an inverse condemnation suit against Seattle in state court, seeking to recover damages allegedly inflicted by Seattle's regulation of its property. The case was later removed by Seattle to federal court. The federal district court initially granted Seattle's motion for summary judgment on Esplanade's substantive due process claims, holding that the only recourse open to Esplanade was a taking claim under the Fifth Amendment to the U.S. Constitution and Art. I, § 16 of the Washington Constitution. *Id.* D-1 - D-6.

On October 31, 2001, the district court granted summary judgment to Seattle on the taking claims. *Id.* C-1 - C-21. First, the court concluded that Esplanade had failed to establish that Seattle's actions were the "proximate cause of its injury." *Id.* C-7 - C-10. That conclusion was based on the court's findings that: (1) Seattle's ruling that on-site parking was both required and prohibited was based on its "reasonable interpretations of the SSMP," *id.* C-8; (2) the development project was not "feasible" because it could never have complied with other provisions of the SMA and the SSMP, *id.* C-8 - C-9; and (3) the project was not "feasible" because Esplanade did not show that it could have raised the funds necessary to complete the project. *Id.* at C-10.

Second, the court articulated an "alternative basis" for denying Esplanade's taking claim: the "public trust doctrine" -- which the court deemed to be part of the "background principles of Washington law" -- barred Seattle and the State of Washington from approving the development project, even if they had been inclined to approve it. *Id.* C-11. The court stated that the public trust doctrine "'prohibits the State from disposing of its interest in the waters of the state in such a

way that the public's right of access is substantially impaired.'" *Id.* C-13 (quoting *Weden v. San Juan County,* 135 Wn. 2d 678, 698-99 (1998)). While conceding that the public trust doctrine as it existed in the early part of the 20th century would not have prohibited Esplanade's development, the court held that that doctrine has been modified in recent years, particularly by adoption of the SMA in 1971. *Id.* C-15 - C-16. "Washington courts have, accordingly, recognized that whatever public trust doctrine existed prior to the enactment of the SMA has been superceded and the SMA is now the declaration of that doctrine." *Id.* C-15. The court held that Esplanade's Takings Clause claim was barred by the SMA because the SMA was enacted before Esplanade purchased its property:

> Esplanade's historical arguments would be more germane had it bought the property before 1971 and was challenging the effects of the SMA itself. Such a scenario would have made it analogous to the facts of *Lucas*. But a crucial difference between *Lucas* and this case is that *Lucas* was challenging a new statute which, he alleged, deprived him of reasonable use of his property. The Supreme Court therefore addressed whether "background principles" of South Carolina law would have precluded the uses anyway. These are not the facts presently before the court. Esplanade purchased the property in 1991, not 1891, and was thus subject to the limitations imposed by the public trust doctrine as codified in the SMA.

Id.

The court went on to conclude that Esplanade's proposed development was incompatible with its conception of the "modern" public trust doctrine. The court held that the proposed development would interfere with fishing and recreational use of Esplanade's property by the general public; in particular, the court noted that the property was just 700 feet away from a Discovery Park, a public recreation area. *Id.* C-19 - C-20. Because the proposed development was incompatible with this background principle of property law, the court concluded, Seattle's refusal to permit Esplanade to develop its property could not be deemed a regulatory taking for which compensation was required.

The Ninth Circuit affirmed. *Id.* A-1 - A-16. While stating that the public trust doctrine "has always existed in Washington," *id.* A-13, the Ninth Circuit admitted that the current conceptions of the doctrine are far broader than in decades past. In particular, the appeals court recognized "a long history 'favoring the sale of tidelands and shorelands,' resulting in the privatization of approximately 60 percent of the tidelands and 30 percent of the shorelands originally owned by the state." *Id.* (quoting *Caminiti v. Boyle,* 752 P.2d 989, 996 (Wash. 1987)). The court stated that the public trust doctrine had broadened in more recent years following adoption of the SMA in 1971; the court stated that adoption of the SMA evidenced the Washington legislature's determination that "'unrestricted construction on the privately owned or public owned shorelines . . . is not in the best public interest.'" *Id.* (quoting RCW 90.58.020). The court held that the public trust doctrine is "reflected in part in the SMA" and "ran with the title to the tideland properties and alone precluded the shoreline residential development proposed by Esplanade." *Id.* A-13 - A-14.

The appeals court held that development of Esplanade's property was inconsistent with the public trust doctrine and thus impermissible, because it would interfere with the public's use of the property for fishing and general recreation. *Id.* A-16. The court did not discuss the fact that Esplanade's chain of title predated 1971, nor did it discuss whether this Court's decision in *Palazzolo* affected the appeals court's determination that the 1971 SMA constituted a "background principle of property law" for purposes of evaluating Esplanade's Takings Clause claim.

In light of its ruling with respect to the public trust doctrine, the Ninth Circuit found it unnecessary to address the district court's alternative grounds for dismissal of the Takings Clause claim: that Esplanade failed to establish that its damages were proximately caused by Seattle's actions. *Id.* A-11.

REASONS FOR GRANTING THE PETITION

This case raises property rights issues of exceptional importance. Seattle insists, and the lower courts agreed, that it is absolved from any Takings Clause liability in this case despite the largely uncontested evidence that its regulation of Esplanade's property has eliminated all economic value from the property. The Ninth Circuit's sole rationale for that conclusion was that the modern version of the "public trust doctrine" -- which the appeals court found to preclude all development of Esplanade's property -- constitutes a "background principle[]" of property law of the type that *Lucas* and *Palazzolo* deemed sufficient to defeat a Takings Clause claim. Yet, as the lower courts candidly admitted, this modern version of the public trust doctrine dates back to

1971 at the earliest; it seemingly permitted residential development of Esplanade's property until Seattle ascribed a contrary interpretation to the SMA and the SSMP *after* Esplanade had filed its development application; and it was never articulated by a Washington court until 1987 at the earliest, if then.

Because Esplanade's chain of title to the property predates by at least 65 years the development of this modern version of the public trust doctrine, there is considerable tension between *Palazzolo* and the Ninth Circuit's determination that the modern public trust doctrine constitutes a background principle of property law sufficient to defeat Esplanade's regulatory taking claim. As the Court explained in *Lucas,* regulations that prohibit "all economically beneficial use of land" entitle the landowner to compensation under the Takings Clause, unless the regulatory prohibitions "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas,* 505 U.S. at 1029. *Palazzolo* made clear that if government regulation of property does not constitute a "background principle[]" of property law with respect to the Takings Clause claims of one owner, it cannot constitute a "background principle[]" of property law with respect to the Takings Clause claims of subsequent owners whose title derives from the initial owner. *Palazzolo,* 533 U.S. at 629-30. The Ninth Circuit's decision therefore conflicts with *Palazzolo* to the extent that the appeals court relied on the fact that Esplanade purchased its property after enactment of the SMA by the Washington legislature. Rather, Esplanade can be denied compensation in this case only if it can be shown that the modern public trust doctrine would constitute a "background principle[]" of

property law even with respect to a landowner who had purchased the Esplanade property in 1906.

Palazzolo explicitly left open the question whether newly-adopted legislation can constitute a "background principle[]" of property law sufficient to defeat a Takings Clause claim. *Palazzolo*, 533 U.S. at 629 ("We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."). *Amici* submit that this case presents an ideal vehicle for addressing that question. There are few disputed issues of fact; for example, the lower courts agreed that development of first-class (urban) tidelands was encouraged by Washington law in past decades, and that it was not until the enactment of the SMA in 1971 that the State began to restrict such development.

Moreover, Washington is not unique among the States in its increasing concern over potential environmental hazards arising from developmental activity adjacent to and within the nation's waterways. Numerous State and local governments have sought in recent decades to impose new restrictions on such development. That trend has led to substantial numbers of Takings Clause suits filed by landowners whose property is rendered worthless by such regulation. The lower courts are in desperate need of additional guidance regarding the very question left open by *Palazzolo*: under what circumstances can environmental legislation designed to protect waterways constitute "background principles" of property law sufficient to preclude a Takings Clause claim by affected landowners? Indeed, numerous Takings Clause defendants have been raising the same defense raised by

Seattle herein: they cite a modern "public trust doctrine" that derives it content from recently enacted environmental legislation. Lower court have provided a variety of responses to that defense; *amici* respectfully suggest that the Court should step in to clear up the confusion.

Certiorari should be granted for the additional reason that the Ninth Circuit's answer to the preceding question is clearly incorrect. The Court made clear in *Palazzolo* that "[a] regulation or common-law rule cannot be a background principle for some owners but not for others." *Palazzolo*, 533 U.S. at 629. Yet, the Ninth Circuit made no effort to square its holding -- that Esplanade's proposed development is inconsistent with the modern public trust doctrine -- with the fact that the owners of many other tidelands within the City of Seattle have developed their property far more extensively than anything proposed by Esplanade. Indeed, Seattle has become the bustling port we see today precisely because numerous landowners have been permitted to erect above-water structures on their tidelands. In the absence of any explanation from Seattle regarding why such developments are allowed to remain in place yet Esplanade is prohibited from making *any* economically viable use of its property, *Palazzolo* dictates that the legislation cited by Seattle to support its prohibition cannot be deemed "background principles" of property law sufficient to bar Esplanade's Takings Clause claims. Certiorari should be granted to resolve the conflict between *Palazzolo* and the decision below.

I. REVIEW IS WARRANTED TO PROVIDE GUIDANCE ON THE IMPORTANT AND RECURRING QUESTION LEFT OPEN BY *PALAZZOLO* REGARDING WHAT CONSTITUTES A BACKGROUND PRINCIPLE OF PROPERTY LAW

Virtually all of the major regulatory taking cases that have come before the Court in recent years (*e.g.*, *Lucas, Palazzolo,* and *Tahoe-Sierra*) have involved land-use restrictions imposed for the purpose of preserving the environmental quality of adjacent bodies of water. That focus is hardly coincidental; the number of such regulatory taking cases has risen dramatically in tandem with the growing public consensus that governments at all levels must take decisive steps to prevent further degradation of marine environments. Landowners who bring such litigation do not dispute the need for such steps; rather, they claim that they are being singled out unfairly to bear the cost of new regulations.

In *Lucas,* the Court began the process of sorting out when the Takings Clause requires compensation for landowners whose property has been rendered worthless due to land-use restrictions imposed to prevent environmental harm. It determined that compensation is required in such cases unless the regulatory prohibitions "inhere in the title itself, in the restrictions that background principles of the State law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. The Court did not endeavor to provide any detailed explanation regarding what constitute "background principles of the State law of property."

The Court provided additional guidance on this issue in *Palazzolo*. It held that if government regulation of property does not constitute a "background principle[]" of property law with respect to the Takings Clause claims of one owner, it cannot constitute a "background principle[]" of property law with respect to the Takings Clause claims of subsequent owners whose title derives from the initial owner. *Palazzolo*, 533 U.S. at 629-30. The Court explained:

> The State's rule [that postenactment purchasers cannot challenge a regulation under the Takings Clause] would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.

Id. at 627.

Palazzolo reversed the Rhode Island Supreme Court's holding that the landowner's Taking Clause claims (based on decreased property value attributable to wetlands regulations) were barred because he had taken title with notice of the previously enacted regulations. *Id.* at 626-30. The Court did not, however, directly address whether those wetlands regulations could be deemed "background principles" of property law within the meaning of *Lucas*. Indeed, the Court explicitly held, "We have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here." *Id.* at 629.

This case raises the precise issue left open by *Palazzolo*. Washington first adopted comprehensive regulation of tidelands development in 1971 when it enacted the SMA, and it was on the basis of this legislation that the Ninth Circuit determined that background principles of Washington property law precluded Esplanade's proposed residential development.[3]

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[3] The Ninth Circuit cited the "public trust doctrine" as the relevant "background principle" of property law. It also quoted the Washington Supreme Court as stating in 1987 that the public trust doctrine "has always existed in Washington." Pet. App. A-13 (quoting *Orion Corp. v. Washington,* 109 Wn.2d 621, 747 P.2d 1062, 1072 (Wash. 1987)). However, the court made clear that the "public trust doctrine" that it was invoking was not the same "public trust doctrine" that had "always existed in Washington." Rather, the court explained that it was invoking a more modern "public trust doctrine," one that takes into account the SMA adopted in 1971. *Id.* Indeed, the appeals court explicitly recognized that before 1971 Washington law had had a "long history" of favoring the sale and development of tidelands, particularly (as here) urban tidelands. *Id.*

The public trust doctrine, as initially recognized by Washington and other jurisdictions, imposed an obligation on States to ensure that any submerged lands sold by the States to private parties not be developed in a manner that would "substantially impair" the public interest in navigation, commerce, and fishing. *See, e.g. Illinois Central Railroad Co. v. Illinois,* 136 U.S. 387, 456 (1892). As originally conceived, that doctrine was never understood to prohibit development (or filling) of tidelands outside of commonly used navigation channels. Indeed, Esplanade's property would not have been deemed "navigable" under the original understanding of the public trust doctrine and as that term was used by the Washington Supreme Court as recently as 1973. *See Harris v. Hylebos Industries, Inc.*, 81 Wn.2d 770, 775, 505 P.2d 457 (1973) (the "line of navigability" is "the inner harbor line" -- a line well seaward both of the low water mark

(continued...)

Thus, the lower courts erred in dismissing Esplanade's Takings Clause claims – unless it is true, as both the district court and the Ninth Circuit held, that the SMA constitutes a background principle of property law that justifies a prohibition of all economically beneficial use of first class (*i.e.*, urban) tidelands in Washington.

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[3](...continued)
and of Esplanade's property); *id.* at 785-86 ("[T]idelands [deeded to private individuals by the State] have never been classified by the state as navigable waters, but have been treated as land."). *Harris* made clear that as of 1973, the Washington "legislative intent regarding the use of tidelands in harbors of cities is manifestly that the navigable portions of such harbors, behind the harbor lines, shall consist of commercial waterways, and that the filling and reclaiming of tidelands which have been sold to private parties shall be encouraged." *Id.* at 786. It was not until 1987 that the Washington Supreme Court, in *Caminiti* and *Orion*, adopted a modern version of the public trust doctrine that expanded that doctrine beyond its initial focus on preserving navigation and fishing rights:

> Historically, the trust developed out of the public's need for access to navigable waters and shorelands, and thus the trust encompassed the right of navigation and fishery. . . . Recognizing modern science's ability to identify the public need, state courts have extended the doctrine beyond its navigational aspects.

Orion, 109 Wn. 2d at 640-41. *Orion* went on to hold that land-use restrictions imposed by the SMA were exempt from challenge under the Takings Clause because the SMA qualified as "a public health and safety regulation." *Id.* at 660. Thus, it is evident that both the Ninth Circuit and the Washington Supreme Court decisions upon which it relied viewed a modern version of the public trust doctrine (one that included the SMA itself) – not the public trust doctrine as it was historically understood -- as the relevant "background principle[]" of property law.

The lower courts have reached widely disparate results when addressing the issue left open by *Palazzolo*. In many of those cases, governments have attempted to avoid Takings Clause claims by reference to a modern version of the "public trust doctrine" that incorporates recent legislative enactments. Several courts have explicitly rejected efforts to expand the public trust doctrine in this manner. *See, e.g., Douglaston Manor, Inc. v. Bahrakis,* 89 N.Y.2d 472 (1997) (refusing to extend the public trust to waters not navigable in fact because it would "precipitate serious destabilizing effects on property ownership principles and precedents"); *Bell v. Town of Wells,* 557 A.2d 168 (Me. 1989) (legislation allowing public recreation on private intertidal land amounted to a compensable taking); *Purdie v. Attorney General*, 732 A.2d 442 (N.H. 1999) (legislation extending the public trust to dry-sand areas would constitute a taking); *Anderson Columbia Co. v. Board of Trustees,* 648 So.2d 1061, 1067 (Fl. App. 1999) (legislative effort to assert public trust control over filled land previously granted to private owners would constitute compensable taking). Other courts, including the courts below, have reached the opposite conclusion. *R.W. Docks & Slips v. Wisconsin,* 628 N.W.2d 781 (Wis. 2001); *National Ass'n of Home Builders v. New Jersey Dep't of Environmental Protections,* 64 F. Supp. 2d 354, 359-60 (D.N.J. 1999) (statute requiring landowner to allow public access to privately owned riverside path is exempt from Takings Clause challenge under public trust doctrine).

Both in view of the importance of the question left undecided by *Palazzolo* and in view of the widely disparate answers provided by the lower courts to this issue, review by this Court is warranted. This case provides an ideal vehicle

for addressing the question, given that the facts of this case are largely undisputed. In particular, there can be no serious dispute that Seattle has deprived Esplanade of all economically productive use of its property. The only use of the property permitted under Seattle's zoning ordinance is residential housing, yet Seattle has prevented such use by simultaneously requiring and prohibiting on-site parking. Moreover, both the Ninth Circuit and the district court were explicit in identifying the SMA -- legislation not enacted until 1971 -- as their principal basis for concluding that Esplanade's Takings Clause claims were barred by "background principles" of Washington property law. Indeed, both courts acknowledged that before adoption of the SMA, state law actively promoted development of tidelands such as Esplanade's. Accordingly, this case squarely presents the issue left open by *Palazzolo,* a recurring issue of exceptional importance that has divided the lower courts.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH *LUCAS* AND *PALAZZOLO*

Review is warranted for the additional reason that the Ninth Circuit's decision is in direct conflict with this Court's decisions in *Lucas* and *Palazzolo*. As noted above, those decisions did not fully define what constitutes a "background principle[]" of property law that would exempt property regulations from Takings Clause challenge. But the Court made clear one essential ingredient of any such background principles: they must apply equally to all property owners. *See, e.g., Palazzolo,* 533 U.S. at 630 ("A regulation or common-law rule cannot be a background principle for some owners but not for others.").

The modern public trust doctrine articulated by the Ninth Circuit fails that test. The appeals court ruled that its version of the public trust doctrine precluded all development of Esplanade's tidelands because development "would have interfered with fishing and recreational use of the tidelands."[4] But the City of Seattle clearly does not intend that the standard it applied to Esplanade should be applied to other tideland owners in the city. If that standard were applied uniformly, much of Seattle harbor would need to be dismantled. The harbor includes numerous above-water structures built on its tidelands. The continued presence of those structures undoubtedly interferes with the ability of the public to use those tidelands for recreational purposes. In the absence of any explanation from Seattle regarding why such developments are allowed to remain in place yet Esplanade is prohibited from making *any* economically viable use of its

---

[4] *Amici* note that the Ninth Circuit's test is far stricter than the one heretofore employed by the Washington Supreme Court. That court has held:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any *substantial impairment* of the public interest in the lands and waters remaining.

Caminiti, 107 Wn. 2d at 670 (emphasis added) (quoting *Illinois Central,* 146 U.S. at 453). Based on evidence that some individuals have on some unspecified occasions used the Esplanade tidelands for recreation and fishing, the Ninth Circuit determined that the planned development "would have interfered with those uses" and thus deemed the development "inconsistent with the public trust doctrine." Pet. App. A-16. The Ninth Circuit made no effort to determine whether such interference would constitute a "*substantial impairment* of the public interest in the lands and water remaining."

property, *Palazzolo* dictates that the SMA -- the legislation cited by Seattle in support of its prohibition -- cannot be deemed a "background principle[]" of property law sufficient to bar Esplanade's Takings Clause claim.

This Court has stated repeatedly that State and local governments may not redefine the meaning of property rights "by *ipsi dixit*," in order to avoid the strictures of the Takings Clause. *See, e.g., Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998). Seattle is attempting just such a redefinition in this case. It is attempting to defeat Esplanade's Takings Clause claim by insisting that Esplanade's ownership interests do not include the right to develop its tidelands, while declining to apply that same rule to other tideland owners. *Lucas* and *Palazzolo* dictate that such selectively-applied rules do not constitute background principles of property law sufficient to defeat Takings Clause claims. The Court should grant review in order to resolve the conflict between the decisions of this Court and the Ninth Circuit's decision.

CONCLUSION

Amici curiae respectfully request that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Dated: April 7, 2003

OPPOSITION

BRIEF

(5)

Supreme Court, U.S.
FILED
MAY 12 2003
OFFICE OF THE CLERK

No. 02-1304

IN THE

Supreme Court of the United States

ESPLANADE PROPERTIES, LLC,

Petitioner,

v.

CITY OF SEATTLE, WASHINGTON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

THOMAS A. CARR
Seattle City Attorney
JUDITH B. BARBOUR*
Assistant City Attorney
600 Fourth Avenue
10th Floor
Seattle, Washington 98104
(206) 684-8251

* *Counsel of Record*

Counsel for Respondent

180757

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that the State of Washington's Public Trust Doctrine is a background principle of Washington law that burdens Petitioners' property and precludes them from prevailing on their claim that the City deprived them of all economically beneficial uses of the property?

2. Did the Court of Appeals err in affirming the dismissal of Petitioners' substantive due process claim for monetary damages for deprivation of property under the Fourteenth Amendment because such claim was subsumed by Petitioners' claim for monetary damages for deprivation of property without compensation under the Fifth Amendment?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption of the Petition for Writ of Certiorari, two other parties warrant mention. By Stipulation and Order of the trial court dated September 24, 2001, plaintiff Esplanade Properties, LLC amended its Complaint to substitute the original owners of the property as plaintiffs. The substituted parties are Larry D. Zahnow, individually, and Gladys I. Mandeville, individually and in her capacity as personal representative of the heirs and devisees of Robert W. Hillstead, deceased.

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Respondent the City of Seattle respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 307 F.3d 978.

STATEMENT OF THE CASE

A. Introduction

"It is beyond cavil that a public trust doctrine has always existed in Washington," said the court below, citing to Washington Supreme court cases. Pet. App. at A-13. It is also beyond cavil that it applies to Petitioner Esplanade's tidelands: "[t]he doctrine reserves a public property interest, the *jus publicum*, in tidelands and the waters flowing over them, despite the sale of these lands into private ownership." *Weden v. San Juan County*, 958 P.2d 273, 283 (Wash. 1998).

B. Relevant Facts

Esplanade purchased 6.1-acres of tidelands in 1991 for $40,000 from prior owners who believed the property could not be developed. ER 123; SER 120. The property is located in Elliott Bay below the precipitous southerly face of Magnolia bluff, waterward of the high water mark. SER 121-24. There is no dry land: the property is completely submerged for roughly half the day. SER 209-11. The property is navigable during high tides by most boat traffic, and regularly used for boating and recreation, facts never disputed by Esplanade, and amply demonstrated in the record. SER 314; 316-18. Native Americans fish in the waters that cover the property and the surrounding area, which, under the Treaty of Point Elliott, is a tribal "usual and accustomed" fishing ground. *Muckleshoot Indian Tribe and Suquamish*

Indian Tribe v. Hall, 698 F. Supp. 1504 (W.D. Wash. 1988). The adjacent tidelands are not developed, except for a large marina (a water-dependent use) some two miles to the East.

In 1992, Esplanade applied for permits for residential development on the property. The SSMP seemingly allowed above-water residential construction of residences on lots that had *less than* 30 feet of dry land; Esplanade had less because it had none.[1] The plan for the "Esplanade Estates" consisted of nine houses and a causeway built on concrete platforms supported by concrete pilings, protected by a large breakwater. SER 121; 122-24. The project appeared to have been designed without consulting the use or development standards of the SSMP, so it quickly ran into Code compliance problems. In early 1993, the City sent out Correction Notices identifying a wide range of items that needed to be corrected, some of which were critical to the project. SER 191-99. The project quickly ran into funding problems as well. Woefully under-capitalized from the outset, Esplanade could not pay its environmental consultant for its preliminary work on the Environmental Impact Statement (EIS). SER 186; 190. The EIS was never even started, even though no permits could ever have issued until it was published.

Esplanade made some corrections, applied for some variances, and requested three formal interpretations of significant SSMP provisions where Code compliance remained an issue, seeking a declaration that the project met the code provisions in question. SER 200-07. In particular,

1. The Seattle City Council later amended the provision to allow such use only when the lot had at least 15 feet of dry land, but the amendment did not apply to Esplanade's application, which, under Washington's "vesting" law, had to be processed according to the ordinances in effect on the date of application.

Esplanade desired parking on site over water. A provision of the SSMP prohibits parking over water unless it is accessory to a water-dependent or water-related use. Residential use of navigable waters and the associated aquatic lands as proposed by Esplanade is neither a water-dependent nor a water-related activity because it is not intrinsically or economically dependent on a waterfront location. These land use principles are outlined in the SSMP, and the City's application of those principles was affirmed by the Court of Appeals for the State of Washington when challenged by Esplanade. SER 224-36. The shoreline parking prohibition overrides the underlying Land Use Code (Code) requirement that there be parking at each residence because the SSMP specifically provides that in the event of conflicts between the shoreline regulations and the underlying zoning, the SSMP prevails. Seattle Municipal Code (SMC) 23.60.014(B)(1). Thus, there was no requirement that Esplanade provide parking on site at the same time that another regulation prohibited it, and no "regulatory Catch – 22." Pet. at 2.

Additional issues where the application was out of compliance related to the size of the proposed piers and docks, and design of the causeway from the bluff out to the houses, and the proposed parking over water. The appeal process began, going from the departmental interpretations to the City's Hearing Examiner, then to King County Superior Court, then to Division I of the State Court of Appeals. Esplanade lost on each issue at every level. SER 208-36. The Washington Supreme Court denied its petition for review on April 1, 1998.

After the Court of Appeals decision, the City sent a letter on November 21, 1997 instructing Esplanade to submit

revised plans consistent with the rulings on all of the code provisions within 60 days, in order to avoid cancellation. SER 251. On the 60th day, January 20, 1998, Esplanade submitted, not the required revisions conforming the plans, but simply an application for parking variances. SER 253-57. The City cancelled the application on April 13, 1998, *not* because it applied for a parking variance (Pet. at 2), but because Esplanade failed to pursue its application in a timely manner. SER 373. The cancellation occurred pursuant to a Code provision, which required an application to be deemed "abandoned and void", if the applicant failed without reasonable justification to submit all required data. Pet. App. C-5. The City's Code does not provide for administrative review of a cancellation.

C. Proceedings Below

In its Complaint, Esplanade alleged that the City's conduct, in its zoning regulations and its cancellation of the project application, resulted in an inverse condemnation violating the Fifth Amendment takings clause. ER 7-12. As its second cause of action, Esplanade alleged that the City violated its right to substantive due process by arbitrarily and capriciously canceling its project application and eliminating all reasonable economic use of the property. *Id*,.; Pet. App. at D-3.

In a series of orders on motions for summary judgment, the district court dismissed Esplanade's state and federal causes of action for violation of its substantive due process rights, holding that Esplanade's substantive due process claim was preempted by its other constitutional claim under *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), applying the rule of *Graham v. O'Connor*, 490 U.S. 386 (1989) to

takings claims under the Fifth Amendment. Pet. App. D. As to its takings claim, the district court held on alternative grounds that the City's regulations and actions were not responsible for any lack of economically viable use of Esplanade's property; first, because Esplanade's project was not financially or legally feasible, it could not show that the City proximately caused its alleged damages;[2] second, because background principles of Washington law — specifically Washington State's expression of the Public Trust Doctrine — would have precluded the development, the City could not be liable for taking a property right that did not exist. Pet. App. C.

The district court relied on the facts, unrebutted by Esplanade, showing that the development proposal would have interfered with the interests in navigable waters that are reserved to the public and protected by Washington's expression of the Public Trust Doctrine. Pet. App. C-19-20. On appeal, a panel (two members of which were seasoned jurists from Washington, well versed in the state's law) of the Court of Appeals for the Ninth Circuit affirmed on all three district court decisions. While it agreed with the district court that a plaintiff alleging a taking must make a showing of causation between the government action and the alleged deprivation of property, the Court of Appeals found it unnecessary to address the question. Because background principles of Washington state law would have precluded the proposed development, the claimed property right never existed. Pet. App. A-11. To reach this conclusion the Court of Appeals relied upon Washington's expression of the Public Trust Doctrine. Quoting from Washington case laws, the Court of Appeals observed that when Washington's tidelands

2. "The amount of undisputed evidence evincing the utter unfeasibility of this project is impressive." Pet. App. C-8.

are conveyed into private ownership, the public retains certain important interests in the use of those lands. Because the district court found that the proposed development would have impaired those publicly held interests in the underlying land, the Court of Appeals concluded that Esplanade did not have the right to develop the property as proposed and could not use this as the basis for a taking claim.

REASONS FOR DENYING THE WRIT

I. The Decision Below Reflects Washington State's Own Expression Of The Public Trust Doctrine.

The first and second questions presented by the Petition ask this Court to make pronouncements on state law of real property and do not present questions worthy of certiorari. Washington's Public Trust Doctrine relates only to Washington's own navigable aquatic lands. As this Court recognized in *Shively v. Bowlby*, 152 U.S. 1 (1894), an examination of

> the laws of the original states shows there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining upland or not, as it considered for the best interests of the public.

Shively v. Bowlby, 152 U.S. at 26. Accordingly, the development of the doctrine is unique to each state and is applied to protect the unique public interests identified by

each state. "Great caution, therefore, is necessary in applying precedents in one state to cases arising in another." *Id. See also State v. Longshore*, 5 P.3d 1256, 1263 (Wash. 2000), citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988).

Washington, like some other states, has a developed body of law relating to the Public Trust Doctrine that applies to the navigable waters within its borders. *See* Ralph Johnson, *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 526-27 (1992). Washington's courts have stated that a Public Trust Doctrine has always existed in this state and that it applies to all navigable aquatic lands. *See Orion Corporation v. Washington*, 747 P.3d 1062, 1072 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988).

Land that is subject to the Public Trust Doctrine is comprised of two elements — the *jus privatum* and the *jus publicum*. The Doctrine is recognition that certain attributes of these lands must be retained in public ownership, much like an easement that preserves certain public uses in the land. The state may, subject to normal constitutional and statutory restrictions, convey the *jus privatum* into private ownership. However, the State typically cannot convey the *jus publicum* interest. This interest is retained as a fundamental incident of the State's dominion over its aquatic lands and is held in trust for the public. *Caminiti v. Boyle*, 732 P.2d 989, 993 (Wash. 1987).

Washington's courts have also identified the interests that are protected. The public interests that are generally identified as having been retained include the rights of "navigation, together with its incidental rights of fishing, boating,

swimming, water-skiing, and other related recreational purposes generally regarded as corollary to the right of navigation and the use of public waters." *Caminiti*, 732 P.2d at 994, quoting *Wilbour v. Gallagher*, 462 P.2d 232, 239 (Wash. 1969), *cert. denied*, 400 U.S. 878 (1970).

While the Public Trust Doctrine is often expressed in the form of judicial control over state action that is alleged to have impaired a retained public trust interest, Washington's courts have also recognized that the doctrine finds expression in the Washington Legislature's enactment of the Shoreline Management Act (SMA). *See Orion*, 747 P.2d at 1091 n.11. (Observing that "trust principles are reflected in the SMA's underlying policy. . . ." citing *Portage Bay-Roanoke Park Comm'ty Coun. v. Shorelines Hearings Bd.*, 593 P.2d 151 (Wash. 1979)). First enacted in 1971, this set of statutes is a form of zoning overlay. The Act directs the Washington State Department of Ecology to identify development standards that ensure that public trust values associated with the state's shorelines are conserved. Local Shoreline Master Programs must reflect these standards. *See* RCW 90.58.060 and RCW 90.58.070.

These observations on Washington's expression of the Public Trust Doctrine are significant for two reasons. First, the fundamental basis upon which the Court of Appeals upheld the district court was that the development, as proposed, was both inconsistent with the Seattle Shoreline Management Program (SSMP) and would interfere with the generally recognized public trust interests that Washington retained when it first sold these lands.

Esplanade could not provide parking on site because the form of development proposed — residential structures —

was not a water-dependent use of the State's navigable water. The SSMP reflects a determination that water-dependent development may further public trust interests in navigable waters. In contrast, nonwater-dependent uses of navigable waters tend to detract from public trust values.[3] In this case, the unrebutted facts presented to the district court showed that the development would interfere with activities that the public had reserved to itself under the Public Trust Doctrine. As such, the proposed development was inherently inconsistent with Washington's expression of the Public Trust Doctrine.

Petitioner's reference to the fact that these are first-class tidelands misses the point. Those tidelands have historically been developed, as indeed have many second-class tidelands located farther from city centers. Washington's shoreline has many wharves, docks and piers that support water-dependent development in both classes of tidelands. The SMA and local master programs allow for such water-dependent development. Historically, the common law Public Trust Doctrine has always permitted such development in aid of navigation. Petitioner's mistake is in assuming that first-class tidelands have been developed in any manner whatsoever completely free from any Public Trust Doctrine restrictions. That proposition simply misapplies how Washington has expressed that doctrine.

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3. For example, when Washington's aquatic lands are conveyed into private use by lease, RCW 79.90.460(2) directs that "[n]onwater-dependent uses of state-owned aquatic lands is a low priority use providing minimal public benefits and shall not be permitted to expand or established in new areas except in exceptional circumstances where it is compatible with water-dependent uses occurring in or planned for the area."

The second point is that the Ninth Circuit's application of Washington's unique expression of the Public Trust Doctrine does not "alter the disposition of tidelands beyond Washington." Pet. at 15. As noted above, the state has always been free to dispose of tidelands, and tideland grantees retain that same privilege. The doctrine simply provides a basis in state real property law for the preclusion of transfers or developments that will impair reserved public trust interests without impairing any constitutionally protected private property right. That is what the Shoreline Management Act seeks to preserve, and how it and the SSMP apply to Esplanades' development proposal.

Furthermore, because this is an expression of the Public Trust Doctrine that is unique to Washington, the Petitioner claims too much by asserting that the federal court's application of Washington law reaches out to other jurisdictions. It does not. The Court of Appeals expressly indicated that the "public trust doctrine, reflected in part in the SMA, unquestionably burdens Esplanade's property." Pet. App. at A-13. The court applied Washington law to the facts in this case and concluded that the petitioner had no right to build residences over tidelands in which the public had a retained interest. A-15 to 16. In reaching this conclusion the court relied upon Washington law and did not establish some principle that overrides other states' expressions of the Public Trust Doctrine.

II. The Decision Below Does Not Conflict With Washington State's Public Trust Jurisprudence Or That Of The Federal Court.

A. The Decision Below Does Not Conflict with Washington Law.

The decision below accurately quoted and faithfully followed the Washington Supreme Court's public trust cases. Pet. App. at 12 - A16. The Court of Appeals correctly found that the outcome of this case was controlled by the leading Washington case, *Orion*, *supra*, a case strikingly similar to this one, as it involved an alleged inverse condemnation by excessive regulation of a proposed residential development on previously undisturbed tidelands. The *Orion* court noted that because sovereignty over tidelands vested in the state upon admission to the Union, at the time the Orion Corporation purchased its tidelands, it purchased the land subject to the trust. Thus,

> Orion had no right to make any use of its property that would substantially impair the public rights of navigation and fishing, as well as incidental rights and purposes recognized previously by this court. Orion never had the right to dredge and fill its tidelands, either for a residential community or farmlands.

Orion, 747 P.2d at 1073. Since there could be no taking of private property because a "property right must exist before it can be taken," neither the SMA and local regulations effected a taking by prohibiting Orion's dredge and fill project. *Id.* (citations omitted).[4]

4. Esplanade claims at n.5, Pet. at 10, that *Orion* is inapposite because it deals with second-class tidelands, but fails to establish (Cont'd)

In the case at hand the district court held, and the Court of Appeals affirmed, that this part of Elliott Bay is navigable and used for fishing and recreation, that the proposed development would have interfered with those uses, and thus, Esplanade never had a right to use the property in the manner proposed, just as the Orion Corporation did not. That conclusion is in keeping with longstanding principles of Washington real property law, particularly insofar as Washington's navigable waters and the Public Trust Doctrine are concerned.

B. The Ninth Circuit's Decision Does Not Conflict With *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892).

Petitioner's claim that the Court of Appeals decision is in conflict with the *Illinois Central* case and that this court must resolve that conflict is not well taken. Even if true, that would be insufficient reason for this Court to accept *certiorari*, for this Court has recognized that "it has long been established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in land as they see fit." *Phillips Petroleum*, 484 U.S at 475. The State of Washington has *not*

(Cont'd)

that the geographical difference between first and second class tidelands makes a difference in regard to the public trust doctrine. Specifically, Esplanade cannot cite any case that holds that the public's right and interest in first class tidelands is *less than* the public's right in second class tidelands. The *Orion* court rejected the same line of argument that is made here — that the public trust doctrine did not apply because the state legislature decided to convey second-class tidelands to private parties for development. 747 P.2d at 1072.

seen fit to recognize private rights that violate the public's rights of navigation and fishery. Instead, it has held that such rights were never conveyed to tideland owners. *Orion*, *supra*.

Second, Petitioner's claim that the Ninth Circuit "radically departs" from *Illinois Central* principles and thus from the Washington cases citing it is not borne out in the state's Public Trust Doctrine cases. The portion of *Illinois Central* that Esplanade claims the Court of Appeals departed from was, in fact, relied upon by the Washington Supreme Court. The court relied on it in developing the test it uses for analyzing a claim that a specific exercise of legislative power with respect to tidelands and shorelands violates the Public Trust Doctrine:

> The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. (Footnote omitted).

Caminiti, 732 P.2d at 994; followed, *Weden v. San Juan County*, *supra*. That control test is applied to ensure that the public's reserved interests in its navigable aquatic lands are conserved.

Here, the district court found that the development would interfere with reserved public trust interests. Because that interference represents an impairment of public trust values without any offsetting public benefit in the form of water-dependent activity, as preferred in the SSMP, the Court of Appeals determination is consistent with the principles

outlined in *Illinois Central* as further developed in Washington's expression of the Public Trust Doctrine.

Petitioner reads *Illinois Central* to mean that the only public trust inquiry allowed goes merely to impairment of what remains of public lands and water after the subject parcel is subtracted from it. (Pet. at 10-11). Petitioner confuses the test for legislation with the quantum of property rights received by a purchaser of a tidelands parcel. Neither *Caminiti* nor *Weden* found the State to have ceded the *jus publicum*.

Not one of the Washington Public Trust Doctrine cases have construed the 1890-95 statutes allowing the individual sales of tidelands and shorelands to mean that the state legislature intended to convey the *jus publicum* and to extinguish the public trust in those lands. *Caminiti* recognized that the state had sold approximately 60 percent of its tidelands and 30 percent of its shorelands pursuant to these statutes, but held even so, that "[t]he Legislature has never had the authority, however, to sell or otherwise abdicate state sovereignty or dominion over such tidelands and shorelands." 732 P.2d at 992. *Accord*, *Orion*, 747 P.2d at 1072-73.

The few Washington cases that Esplanade cites for the proposition that the Court of Appeals' decision conflicts with *Illinois Central* as adopted into Washington law are inapposite, distinguishable either on their facts or on the law. For instance, *Harris v. Hylebos Industries, Inc.*, 505 P.2d 457 (Wash. 1973); *Washington v. Sturtevant*, 135 P. 1035 (Wash. 1913); and *Port of Seattle v. Seattle & Oregon R.R.*, 255 U.S. 56 (1921) are riparian rights case, not public trust cases, and the statements made in them concerning the quality of the state's ownership of its tideland are made in

emphasizing the complete absence of riparian or littoral rights in the state.

In any case, the distinction that Esplanade tries to make in order to claim that the lower court's decision conflicts with the *Illinois Central* test for legislation does not aid its theory, for even under Esplanade's version, its proposed project would indeed impair the public trust as a whole. The record below shows that the project involved the placement of scores of concrete pilings, topped by roads and houses. This not only displaces the public's right to go where the navigable waters go, but also substantially impairs the public trust in the surrounding tidelands as an obstruction both to navigation and to the drift nets used by tribal fishers. In addition, the development would have cut off public access to the publicly owned tidelands beyond Esplanade's property for hundreds of feet along the shore.

C. There is No Conflict with the Decisions of Other Circuits or States.

As for the claimed conflict with other circuits, there is none. We know from *Shively v. Bowlby* and *Phillips Petroleum* that the common law Public Trust Doctrine varies from state to state and has been altered in both statutes and in state constitutions. There could only be a true conflict between circuits on the matter if two state doctrines were identical in nature, and two circuit courts of appeal interpreted them, on basically the same fact pattern, in two contradictory ways. The two cases cited, *West Indian Company, Ltd. v. Virgin Islands*, 844 F.2d 1007 (3d Cir. 1988) and *Dardar v. Lafourche Realty Co., Inc.*, 985 F.2d 824 (1993) bear no resemblance to the case at hand, and, thus, present no such conflict.

III. The Ninth Circuit's Decision Applying State Law Does Not Raise An Important National Question Of Law.

Neither the Petitioner nor *amici* Washington Legal Foundation and New England Legal Foundation have cited a case of national importance on the issue of what is a "background principle" of law under *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003 (1992) that is at odds with the Ninth Circuit's opinion that under Washington law, the State did not convey to an owner of tidelands such as Esplanade a constitutionally protected right to fill and build in a way that would substantially interfere with navigation and fishery.

Amicus Pacific Legal Foundation brings to the Court's attention the recent case of *McQueen v. South Carolina*, __ S.E.2d __, 2003 WL 1957496 (S. Car. 2003). While that case cites to the Ninth Circuit's decision below, it did not apply the holding in this case to arrive at its conclusion that no taking had occurred. Instead, the South Carolina Supreme Court applied South Carolina's own expression of the Public Trust Doctrine, and its own background principles of property law, to determine that a lot owner had lost title to a piece of upland property that gradually became inundated due to coastal erosion. In essence, the court determined that South Carolina property law recognized a moving boundary between private uplands, and aquatic lands owned in fee by the state, in the case of erosion and accretion. The court merely concluded that the upland owner no longer owned the inundated parcel of former uplands and had no right to reclaim the land by fill. The citation to the Court of Appeals decision in this case was made for the simple and uncontested proposition that when background property principles demonstrate the absence of a property right, there can be no taking.

Because this Court has consistently held that each state has the authority to define the boundaries of its Public Trust Doctrine as well as the scope of the interests protected thereunder, the decision below is limited in its application to the State of Washington. Thus, within the context of the Court of Appeals' recognition of the State's Public Trust Doctrine as a "background principle" of Washington's property law that precluded Esplanade's claim of a categorical regulatory taking under *Lucas*, *supra*, its precedential value for other federal circuits and states is quite limited. What is a background principle of law in one state is not necessarily one in another. For prudential reasons, this Court should eschew the invitation presented by the *amicus* brief (at 10) of the Washington Legal Foundation to answer the question left open by the statement in *Palazzolo v. Rhode Island*, 533 U.S. 606, 629 (2001) that "[w]e have no occasion to consider the precise circumstances when a legislative enactment can be deemed a background principle of state law. . . ."

IV. The Case Presents No Issues Of Significant Public Importance Requiring Resolution Of Conflicts Regarding Substantive Due Process.

Petitioner asks its Third Question Presented as if the facts and theories relevant to its substantive due process claim are different from those applicable to the takings claim. This is not true. The Complaint uses the exact same facts — the City's actions regarding its shoreline development regulations and the cancellation of the permit application — to support both causes of action. Under the takings rubric, Esplanade alleged that, as a consequence of the city's actions, it lost all viable economic use of its property. In its second cause of action, it alleged that the acts of the City were arbitrary and capricious, eliminating all reasonable economic use of its

land, and that its right to substantive due process was thereby violated. The prayer for relief asked only for monetary damages, "in an amount equal to the just compensation to which plaintiff is entitle for the condemnation of its property," and the usual fees and costs. ER 7-12. The district court noted that Esplanade made no attempt to request either injunctive or declaratory relief, the standard relief associated with "arbitrary and capricious" type substantive due process claims. Pet. App. at D-4. "Thus," the court held, "because the Fifth Amendment offers explicit protection against the type of government conduct alleged in this case, under *Armendariz*, 'the claim must be analyzed under [the takings clause] alone, and not under the mere general guarantee of substantive due process,'" quoting *Macri v. King County*, 126 F.3d 1125 (9th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1997) (citing *Armendariz v. Penman*, 75 F.3d 311, 325-26 (9th Cir. 1996). Pet. App. at D-5. The Court of Appeals affirmed, noting that *Armendariz* is controlling precedent.

The ruling in *Armendariz* has been distinguished by some of the other circuits as noted by the Petitioner. However, this case does not present a meaningful vehicle for resolving the various conflicts among the circuits relating to substantive due process claims because the facts and relief requested in this case demonstrate that Esplanade's takings claim was essentially identical with its substantive due process claim. While the Fifth and Sixth, and perhaps, the D.C. Circuits may disagree with the Ninth's application of *Graham v. O'Connor* to takings cases, this case does not present a platform upon which this Court could meaningfully analyze any distinction between the two types of claims. The Court should wait for a case that would result in a more thorough delineation of the conflict among circuits. Any conflict is more meaningfully examined where contours of the parallel

claims may give rise to different forms of requested relief or require consideration of additional facts unique to one or the other claim.

In any case, should this Court accept *certiorari* on the issues presented in Petitioner's third Question Presented, it could, and should, do so without also accepting *certiorari* on the first two questions, which deal primarily with state law.

CONCLUSION

For all of the above-stated reasons, the City of Seattle respectfully asks this Honorable Court to deny the Petition.

Respectfully submitted,

THOMAS A. CARR
Seattle City Attorney
JUDITH B. BARBOUR*
Assistant City Attorney
600 Fourth Avenue
10th Floor
Seattle, Washington 98104
(206) 684-8251

Counsel for Respondent

* *Counsel of Record*

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No. 02-1304

In the

Supreme Court of the United States

ESPLANADE PROPERTIES,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

J. DAVID BREEMER
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioners

QUESTIONS PRESENTED

1. May a federal court impose upon the state a unique, restrictive version of the public trust doctrine that is incompatible with the state's own doctrine and with the decisions of this Court upon which the state's doctrine is premised?

2. Whether a federal court may modify a state's long-established public trust doctrine and declare the doctrine a "background principle of the state's law of property" that allows local governments to preclude any economic use of private tidelands that interferes with public recreation without incurring an obligation to pay just compensation.

3. Whether a substantive due process claim is categorically barred when the alleged violation may be partially addressed by a claim for just compensation under the Fifth Amendment, even when the facts and theory relevant to the due process claim differ from the facts and theory applicable to the takings claim.

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REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Esplanade Properties respectfully files this Reply to the Opposition to Esplanade Properties' Petition for Writ of Certiorari (Opp.).

INTRODUCTION

Respondent's opposition fails to recognize the importance of resolving the federal questions presented in this case.

ARGUMENT

I

THIS CASE RAISES A CRITICAL NATIONAL ISSUE AS TO WHETHER FEDERAL COURTS MAY COMPEL A STATE TO APPLY A VERSION OF THE PUBLIC TRUST DOCTRINE MORE HOSTILE TO PRIVATE PROPERTY RIGHTS THAN THE STATE'S OWN VERSION

Respondent's opposition argues that the decision below raises no issue of importance because the Ninth Circuit correctly applied Washington State law in concluding that the public trust doctrine barred Esplanade's claim for just compensation. This Court need not engage in a comprehensive review of Washington State law to see that this is untrue.

The Washington Shoreline Management Act (SMA) does not bar private uses, including residential development, on tidelands. In their opposition brief, Respondent concedes that city regulations designed to implement the SMA allowed "above-water residential construction of residences" on Esplanade's property. Opp. at 2. Respondent then admits that "Washington courts have . . . recognized that the [public trust] doctrine finds expression" in the SMA. *Id.* at 8. If so, the state's public trust doctrine does not preclude residential

development of tidelands because such development diminishes public recreation on those same lands, as the Ninth Circuit concludes.

Even aside from the SMA, Respondent does not dispute that the state has historically permitted the acquisition and development of first-class tidelands by private parties. *See* Opp. at 9. Respondent erroneously suggests, however, that such development has been restricted to wharfing and docking uses. This ignores Washington decisions that have allowed or recognized a great variety of development, including residential development, on tideland parcels in the very area at issue in this case. *See, e.g., Eastlake Cmty. Council v. Roanoke Assoc., Inc.*, 513 P.2d 36 (Wash. 1973) (condominium project on Seattle shoreline approved as consistent with public trust); *Portage Bay-Roanoke Cmty. Council v. Shorelines Hearings Board*, 593 P.2d 151, 153 (Wash. 1979) (state's "public benefit" doctrine permitted Seattle to approve "substantial development" of floating homes and dryland parking).

Orion v. State of Washington, 747 P.2d 1062 (Wash. 1987), did not repudiate the state's legal tradition permitting some development of first-class tideland parcels. It only held that the dredging, filling, and reclaiming of 5,600 acres of a state-designated estuarine sanctuary, zoned for aquatic uses, was inconsistent with the public trust doctrine. *See Orion*, 747 P.2d at 1073.

The state's measured understanding—allowing development of parcels within an industrial harbor area, while precluding wholesale destruction of a fragile bay—does not go far enough for the Ninth Circuit. That court concocted and applied a version of the public trust doctrine that logically precludes *any* development project that interferes with public recreation on *any* tidelands, without reference to their zoning classification, historical treatment, size, location, or the impact of the project on remaining public trust lands. *See* Petitioner's

Appendix at A-16. Private interests that previously included the ability to make some developmental use of first-class tidelands are swept away by judicial fiat.

Having stripped all private developmental right from Esplanade's title, the Ninth Circuit dismissed Esplanade's claim that the City caused a taking by preventing it from making any economically viable use of its property. But no Washington State decision ever held that a federal takings claim is totally barred simply because it arises from tidelands. The closest case–*Orion*–refused to decide whether "the public trust doctrine precludes Orion's takings claim in its entirety." Instead, it remanded for consideration of "whether Orion's property, burdened by the trust, is functionally and economically adaptable to some present, possible and reasonably profitable use." 747 P.2d at 1073. In other words, a takings claim may be possible in spite of, or consistent with, Washington's public trust doctrine.

Once again, the state's interpretation does not go far enough for the Ninth Circuit. Using the rubric of the "background principles" concept articulated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), the court insulates Washington governments from regulatory takings claims arising from tidelands. *See* Pet. App. at A-15 (stating that *Lucas* "effectively recognized the public trust doctrine" as a "background principle" that bars Esplanade's takings claim). An inquiry into whether tidelands are amenable to some viable and possible use[1] is no longer necessary to

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[1] Given Washington State history, a careful inquiry would have shown that Esplanade's property was amenable to the very use it sought. But even a perfunctory inquiry would have shown that it was amenable to the type of residential uses allowed by *Eastlake*

(continued...)

resolve the takings claim; the public trust precludes the claim in its entirety. In conclusion, the Ninth Circuit informed the state that it is "obligated" to enforce this restrictive understanding of the public trust doctrine. Pet. App. at A-16.

The concern here is not that the Ninth Circuit has misapplied state law. The concern is that it (mis)used this Court's "background principle" concept to impose a public trust doctrine on the state that deprives tideland owners of interests previously respected by the state and, thus, strips these tideland owners of a cause of action under the United States Constitution. In sum, the concern is that the lower court's decision has (1) redefined state property rights in tidelands, so as to eviscerate all private developmental interests; (2) precluding tideland owners in Washington of any cause of action under the Takings Clause of the Fifth Amendment to the United States Constitution; (3) and directed the state to enforce this understanding.

These issues necessarily involve some understanding of Washington history and law, but they ultimately implicate nationally important questions of federalism and federal constitutional rights.

II

THE PETITION RAISES A VALID QUESTION CONCERNING WHETHER A LANDOWNER MAY ASSERT A SUBSTANTIVE DUE PROCESS CLAIM ALONG WITH A TAKINGS CLAIM

Respondents' opposition attacks the third question presented by the petition, dealing with whether Esplanade could

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[1] (...continued)
Community Council, 513 P.2d at 44, and *Roanoke Park Community Council*, 593 P.2d at 153.

raise a substantive due process claim,[2] by suggesting that the "facts and theory" of that claim are identical to those relevant to its takings claim. This argument misses a fundamental and inherent theoretical distinction between takings and due process claims, and misconstrues the nature of Esplanade's complaint.

Esplanade's takings claim is based on the effect of the City actions on its rights as the *owner of private property*. Its due process claim arises from the sense that the City has violated its *general rights as a citizen*. Thus, the takings claim rests primarily on the impact of the City actions on the use of Esplanade's property, while the due process claim alleges the city's dealings with Esplanade did not advance a valid purpose. While these claims may arise, in a general sense, from the same governmental actions, the facts *relevant* to each claim are different.

In its general prayer for relief, Esplanade asks for monetary damages. But it also asks for any other relief to which it might be entitled. This Court has clearly stated that invalidation of the offending action is the appropriate relief for a substantive due process violation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 197 (1985) ("The remedy for a regulation that goes too far, under the due process theory, is not 'just compensation,' but invalidation of the regulation, and if authorized and appropriate, actual damages."). In any case, the Ninth Circuit did not dismiss Esplanade's due process claim because of the remedies it sought. It dismissed it because it concluded that, as a matter of law, such a claim could not be asserted when the takings

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[2] The third question presented is "Whether a substantive due process claim is categorically barred when the alleged violation may be partially addressed by a claim for just compensation under the Fifth Amendment, even when the facts and theory relevant to the due process claim differ from the facts and theory applicable to the takings claim."

claim provided more "explicit" protections. *See* Pet. App. at A-6.

III

THIS CASE IS AN APPROPRIATE VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

The Respondent tries to suggest to this Court that Esplanade failed to avail itself of all available administrative processes. But it never raised any concern in the courts below that Esplanade's claims against the City are unripe, nor did those courts see anything in the facts sufficient to raise the issue sua sponte.

There is good reason why the parties and courts have treated the claims in this case as fit for resolution. Under the City code, residential use was "the only permissible use of the property." *See* Pet. App. at C-14. But the City's construction of its own code made clear that Esplanade could not gain approval of its proposed residential project, or any other residential development. This is because the City interpreted its shoreline regulations to prohibit on-site parking for residential above-water development. When read in conjunction with a land use code provision that required on-site parking for otherwise permissible residential development, this interpretation made it clear that Esplanade would not be able to lawfully proceed with any residential development.

At this point, any other (nonparking) compliance problems became irrelevant. Even if Esplanade satisfied all such issues, which it intended to do if the parking barrier was lifted, the contradictory parking regulations would prohibit the only viable permissible use of its property. In short, it would have been utterly futile for Esplanade to revise its plans, in the hope that changes would result in the City's approval. Because it was pointless to provide additional information on nonparking

compliance issues, Esplanade applied for a variance from the parking code, which the City refused to consider.

Given these facts, it is manifestly clear that the City will not authorize the only developmental use statutorily allowed on Esplanade's property. Therefore, like the lower federal courts, this Court can address the significant questions presented by this case on their merits. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 619-26 (2001) (claim ripe where regulations make clear the extent of permissible development); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) (claim ripe where regulations showed that no developmental use was permitted on private property). And it should do so, for, if allowed to stand, the ruling below will bar Esplanade and other property owners in the same situation from ever being able to assert a valid regulatory takings claim or a claim that its due process rights have been violated.

CONCLUSION

For the foregoing reasons, the Court should grant Esplanade Properties' Petition for Writ of Certiorari.

DATED: May, 2003.

Respectfully submitted,

J. DAVID BREEMER
Of Counsel
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JAMES S. BURLING
Counsel of Record
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioners